88-1690

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

GREATER BUFFALO PRESS, INC., individually, and as payee and holder; and on behalf of each other similarly situated payee and holder on *Appendix A*; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A., (formerly THE LINCOLN FIRST BANK);

Petitioner,

vs.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, NY Branch thereof; JOHN T. KEAN, individually, and as an Officer and Manager thereof;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Can the Federal Reserve System immunize itself from gross negligence in carrying out its fiscal responsibilities?

2. Can FRB Regulation J deny remedy to holders of checks dishonored because of FRB's gross negligence in delaying processing of checks for 2-weeks, where:

   a) FRB promised holders "Overnight Check Clearance";

   b) FRB failed to advise of delays; and,

   c) Alternative check clearing routes were available?

3. Can FRB, with impunity, artificially inflate US Money Supply by creating over $1 Billion artificial "float" in M_1, by improperly giving member banks "Immediate Payment" credits—without off-setting debits against payee banks—in order to "cover-up" its check processing delays?

List of Parties

Petitioner Greater Buffalo Press, Inc., at all times herein, was a wholly-owned subsidiary of GBP Industries, Inc., a New York corporation, except that on or about December 31, 1987, it was merged into GBP Industries, Inc., and became a division thereof. GBP Industries, Inc. has one non-wholly owned subsidiary, to wit, National Inserting Systems, Inc.

Respondent Federal Reserve Bank of New York is a public corporation created by the Federal Reserve Act, 12 USC §241 *et seq.* The Respondent Buffalo Branch of the Federal Reserve Bank of New York is a branch thereof, and John T. Kean is an officer and manager thereof.

This action was never certified as a Class Action by the District Court. Petitioner was allowed to proceed on behalf of 59 holders of checks delayed by the Respondent Federal Reserve Bank, whose names are set forth in Appendix B at p. 35a, and Appendix D at pp. 55a-56a; together with the names of their respective parent corporations, and their non-wholly owned subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

October Term, 1988

GREATER BUFFALO PRESS, INC., individually, and as payee and holder; and on behalf of each other similarly situated payee and holder on *Appendix A*; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A., (formerly THE LINCOLN FIRST BANK);

Petitioner,

vs.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, NY Branch thereof; JOHN T. KEAN, individually, and as an Officer and Manager thereof;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Decision dated January 18, 1989 of the U. S. Court of Appeals for the Second Circuit is reported at _____ F2d _____. It is reproduced in the Table of Appendices as Appendix A at pp. 1a-21a.

The Order and Opinion of the U. S. District Court for the Western District of New York dated March 17, 1988 is not reported, and is reproduced as Appendix B at pp. 22a-35a.

Jurisdictional Statement

The grounds on which the jurisdiction of this Court is invoked are as follows:

A. The Judgment sought to be reviewed is that of the U. S. Court of Appeals for the Second Circuit, dated January 18, 1989, affirming the Order and Judgment of the U. S. District Court for the Western District of New York entered March 17, 1988, which dismissed the action.

B. The Court of Appeals' mandate was issued on March 8, 1989, and was entered in the District Court on March 17, 1989.

C. Jurisdiction is conferred on this Court to review the Judgment in question by Certiorari by 28 USCA 1254(1), 2106 and 2111.

Statutes and Regulations Involved

The statutes and regulations involved are lengthy, and the pertinent parts thereof are reproduced in full as Appendix C at pp. 37a-51a.

Statement of the Case

The Second Circuit's opinion (App. A at pp. 1a-21a) upheld the Respondent Federal Reserve System's (hereafter "FRB") claim that the Federal Reserve Act (12 USC §§241 *et seq.*) empowers the FRB to grant itself "sovereign immunity" from liability or duties to Petitioners as members of the public, business and State and local governmental sectors (hereafter "public sector") of the U.S. national banking and economic structure.

The FRB claims that it elected to implement this power by creating a "sender only" rule by enacting Regulation J (12 CFR 210, as amended, eff. September 1, 1977). FRB contends that it thereby immunized itself from any duty or liability to members of the public sector—*i.e.*, Petitioners, as "holders" or "owners" of checks returned to them unpaid by their depository banks, being FRB's member or "sender" banks—due to gross and aggravated negligent and inexcusable delays of the checks by the FRB.

FRB claims that it had no duty to Petitioners, and no liability for breach of any duty to them, as "holders" or "owners" of said checks.

Further, FRB asserts that it could suppress all information of the delays—even if it entailed generating a resulting fictitious Billion Dollar "float" in the US M_1 Money Supply. Its claims that it did not even have any duty to warn Petitioners, or even Petitioners' depository banks, which were FRB's member or "sender" banks, of said delays in order to allow them to use, or advise their depositors to use, available and expeditious alternative check clearing procedures or routes, under which the checks would have been paid by the payor bank.

FRB repealed its "sender only" rule in 1986, when it amended Regulation J (51 Fed. Reg. 21741, June 16, 1986). It seeks to justify its actions by the tenuous claim that the "sender only" rule was a reasonable rule until such time as it was given the power to charge for its check clearing services. This, FRB claims, occurred with enactment of §248a, and the amendments to §342, of the Federal Reserve Act, by the Monetary Act of 1980 (P.L. 96-221, March 31, 1980)—even though FRB previously had the power to charge for its services under 12 USC §342, and, in any event, FRB did *not* implement said alleged new power, and did not repeal the arbitrary "sender only" rule, until 1986, or not until six years *after* said Monetary Control Act of 1980.

The Material Facts of the Case

The material facts relevant to consideration of the Petition are as follows:

In November, 1977, FRB's Buffalo "Regional Check Processing Center" ("RCPC") delayed processing tens of thousands of checks—worth over $1 Billion—for up to two-weeks, because of long-standing problems with its check processing machinery, aggravated by a normal seasonal increase in checks, and its failure either to work overtime, or trans-ship the excess checks for processing at its other RCPC facilities in Utica or Jericho, NY, or, Cranford, NJ (Pet. Ex. 9, p. 17; App. E, p. 64a).

Checks which, by reason of FRB's long delays, were not presented until on or after the November 30, 1977 banking day, were dishonored by the paying Lincoln First Bank of Rochester because, the drawer, Neisner Bros, Inc. of Rochester, filed a petition for corporate reorganization under Chapter 11 of the Bankruptcy Act at 9 AM on December 1, 1977. The Lincoln First paying

bank was located only 70 miles from Buffalo, and was easily available for "direct presentment" of the checks if Petitioners, or their sending banks, had been warned by FRB of the delays.

All of payor Neisners' accounts and funds were frozen on December 1st, and all of the delayed checks presented on and after November 30th were returned unpaid by the paying bank to FRB, which, in turn, returned them to Petitioners via Petitioners' depository banks. Petitioners' valid checks thereby were transformed without their fault into General Unsecured Claims against Neisners as a Debtor-in-Possession.

Neisners had adequate cash reserves to pay all checks which it issued to Petitioners. All checks presented on or before November 29th, were paid on November 30th, the next banking day, and prior to Neisners' Chapter 11 filing on December 1, 1977.

Petitioners' checks would have been paid if, instead of being delayed, they had been processed by the FRB on its usual "overnight" check clearance schedule, and presented to payor Lincoln First Bank on or before the November 29, 1977 banking day (Pet. Ex. 9, pp. 17 & 20; App. E, p. 64a).

FRB suppressed all evidence of the problem by pretending that there was no problem, and effecting a "cover-up", pursuant to which it gave the depository, or "sender", banks their usual "Immediate Payment" credits for over $1 Billion in unprocessed checks, which were stored in bags for up to two weeks.

Because the over $1 Billion in checks were untallied, and stored in bags, FRB was *unable* to debit the paying banks, and thereby created an artificial inflationary "float", which it injected into the US M_1 Money Supply (Pet. Exhs. 1 & 4, App. E, pp. 58a, 62a).

FRB's cover-up compounded its already egregiously tortious conduct, by storing the unprocessed checks in the unopened bags at the rear of a "dead-end" storeroom; and, when it later removed the checks for processing, as it caught up, it removed them on a "LIFO" basis, such that the oldest—and longest delayed—checks at the rear storeroom were the last to be withdrawn and processed. Thus although it fell two whole banking days behind (or over $1 Billion behind) in its backlog, the checks at the rear of the storeroom were delayed for up to two whole weeks.

FRB had widely promoted the expedition of its RCPC check processing facilities, and promised "overnight" check clearance to induce holders, and their depository "sender" banks, to induce them to use FRB's check processing facilities in preference to available alternative check clearing facilities and methods (Pet. Ex. 9, pp. 17 & 20; App. E, p. 64a).

Petitioners are holders, payees or owners of checks deposited by them in their depository banks, and presented by said depository banks to FRB's Buffalo RCPC on or prior to FRB's November 28, 1977 banking day, but which, by reason of FRB's delays, were not presented to Lincoln First Bank until on or after Lincoln First's November 30th, 1977 banking day.

Petitioners' delayed and dishonored checks were returned to them by their depository banks, being FRB's "sender" banks, which returned the checks to them, after the FRB returned the checks to its sender banks, after dishonor by the payee bank due to FRB's delay.

If the check holders, or their banks, had used the available alternative check clearing methods, all checks presented on or before the November 29, 1977 banking day would have been paid by the payor bank.

Respondents asserted for the first time on their summary judgment motion, filed 12 years after the action was instituted, that the "sender only" rule applied. Petitioners then moved for leave to join all of the respective depository banks being the respective "sender" banks.

The District Court denied Petitioners leave to add the additional "sender" banks. The Second Circuit referenced such refusal, but did not rule on the District Court's denial of the motion (App. A, pp. 8a-9a).

Basis for Federal Jurisdiction in the District Court

Petitioners sued the Federal Reserve Bank of New York, as well as its Buffalo, New York Branch, and its vice President and Manager, alleging jurisdiction under the Banking Code, 12 USC §§221, 341 and 632, *et seq.*; and, under 28 USC §§1346(b), 1391, 2401-2416 and 2671-2780, *et seq.*

Petitioners also joined the depository or "sender" bank of the lead Petitioner, Greater Buffalo Press, Inc., *i.e.*, the Marine Midland Bank-Western of Buffalo, New York.

I. Reasons for Allowance of Writ

The Second Circuit, in upholding the FRB's claim that, under FRB Regulation "J", it is answerable only to its "sender" or member banks for failing to observe the normal banking and UCC standard of "ordinary care" in the processing and clearing of checks presented to it (App. A, p. 15a), in effect granted the FRB the right to claim "sovereign immunity".

Citing *Chrysler Corp. v. Brown*, 441 US 281, 295-6 (1979) that FRB Regulation "J" "must be given the force and effect of federal law", the Second Circuit upheld the FRB's claim that it was empowered to grant itself sovereign immunity with respect to any and all claims that it chose not to have asserted against it.

Not only does the FRB make this claim of immunity to anyone but a "sender", regardless of FRB's violation of the normal banking standard of "lack of ordinary care", but also extends its immunity to any gross negligence, fraud, breach of contract, misrepresentation, "cover-up" and suppression on its part. It claims freedom from any and all claims for damage to the holders of checks which it failed to process on a timely basis.

The FRB even claims immunity from fraudulent failure to warn of its check processing bottlenecks and buildups that it *knew* were delaying checks for up to two weeks, and to warn that it was not taking any measures to reduce the backlog.

The Second Circuit thus effectively upheld the FRB's claim that the FRB has full power to grant itself immunity from any commercial, financial and banking codes uniformly adopted throughout the United States, including the Uniform Commercial Code (App. C, pp. 37a-42a).

The Federal Reserve Bank thus takes unto itself, and the Second Circuit has upheld its claim to, immunity from suit—even by the Commonwealth of Massachusetts, one of the class action plaintiffs herein (App. A, p. 35a), thereby taking unto itself sovereign immunity equal to that of the sovereign itself (*Minnesota v. US*, 305 US 382 (1939); US Constitution, Art. III, §§1 and 2; 28 USC §251; *Feres v. US*, 340 US 135 (1950); *Cf. National City Bank of New York v. Republic of China*, 348 US 356 (1954); *Affiliated Ute Citizens of Utah v. US*, 406 US 128 (1972)).

Obviously, the FRB has no such immunity, as evidenced by the many suits against it in which lack of jurisdiction was not claimed or upheld (*Banco de Espano v. Federal Reserve Bank of New York*, 114 F2d 438 (CA2, 1940)).

Congress obviously did not grant the Federal Reserve System any immunity whatsoever. Rather, the Banking Code, 12 USC §341, entitled "Powers and Duties of Federal Reserve Banks" provides that a Federal Reserve Bank shall be "a body corporate" and, as such, shall have power:

> "Third. To make contracts.
>
> "Fourth. To sue and be sued, complain and defend, in any court of law or equity.
>
> * * *
>
> "Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed." (See App. C, p. 50a).

The FRB should not be allowed to escape from the consequences of a "cover-up" of its check processing debacle by continuing to do business as usual, and by not warning the banking or business communities, and the public, in order to allow them to take available, effective and expeditious alternative check clearing routes which admittedly would have cleared their checks prior to the Neisner bankruptcy.

II. An extraordinary price was paid for FRB's "immunity".

The FRB unilaterally exacted an extraordinary and inexcusable "price" from the US National economy, and the FRB's own M_1 Indices of the US Money Supply, for its effort to "Deep-Six" its check debacle, and cover-up the two week delay. FRB's "business as usual" policy during the crisis, demonstrates its selfish "CYB" motivations, in implementing its claim to immunity.

FRB's unchecked claims to immunity despite gross negligence, and indeed, complete indifference to the national welfare, are foreboding in their potential reach. If upheld in this case, what next?

Instead of acting reasonably—like a sovereign should—and giving consideration to the welfare of those hopelessly subject to its vagaries, FRB continued to do business as usual. It refused to make *any* announcement of the delays to the banking or business communities, or the public, either to warn them off—or to allow them the free choice to take available, effective and expeditious alternative check clearing routes which admittedly would have cleared their checks prior to the Neisner bankruptcy.

The Second Circuit's decision seemed more like worshipful praise of the FRB's prowess, rather than an analysis of its present abuse, and its potential for future abuse.

The proposition that FRB can immunize itself from all of the foregoing activities by adopting a "sender only" in its Regulation J, thus violates both the Federal Reserve Act and the due process clause of the U.S. Constitution.

III. The Supreme Court should resolve the nature and extent of the FRB's "preemption" right.

The Second Circuit "straddled the fence" on the nature and extent of the FRB's claimed immunity powers. It seemed to imply that the 1980 amendments to the Federal Reserve Act by the Monetary Control Act of 1980 changed the FRB's power to create immunity for itself. However, the Second Circuit never made that clear.

Nor did it explain how a 1980 amendment to the Banking Act—which the FRB did not choose to implement until six years later, when it amended Regulation "J" in 1986—represented any change in the FRB's power, or lack of power, to create immunity for itself.

Nor did the Second Circuit comment on Petitioners' claim that the amendments to the Banking Act, §§248 and 342, and the addition of §248(a), did not change the FRB's immunity creating rights—or even its power to charge for its check collection services.

The Second Circuit *overcame* the liability creating provisions of New York's UCC, §§4-201 and 4-202—as well as §4-103—by using a Seventh Circuit decision to interpret New York law as holding that FRB Regulation "J" controls (App. A, pp. 16a-17a; See *Appliance Buyers Credit Corp. v. Prospect National Bank,* 505 F.Supp. 163, 164 (C.D. Ill. 1981) aff'd, 708 F.2d 290 (CA7, 1983)).

However, the Second Circuit noted that even if Regulation "J" was inconsistent with New York law, Regulation "J" would "preempt the inconsistent state law provisions . . . on the part of Fed. NY", citing a First Circuit District Court (App. A, pp. 17a-18a; *Colonial*

Cadillac, Inc. v. Shawmut Merchants Bank, N.A., 488 F.Supp. 283, 286 (D. Mass., 1980); as well as *Washington Petroleum and Supply*, 629 F.Supp. at 1229-30).

However, the "preemption" power of the FRB's Regulation "J" has been interpreted variously by the Circuits and Districts. FRB's own counsel claims that various Courts, including the Seventh Circuit, view Regulation "J" as a "Federal-preemption" right, citing *Appliance Buyers Credit Corp. v. Prospect Nat'l Bank of Peoria*, (*supra*), while the Fifth Circuit views the inter-relationship as a "harmonization approach", citing *Childs v. Federal Reserve Bank of Dallas*, 719 F.2d 812 (CA5, 1983) rehearing denied, 724 F.2d 127 (CA5, 1984).

We urge the Court to resolve and define the nature and extent, if any, of the FRB's right of claimed "preemption" by its claimed unrestricted ability to promulgate Regulations limiting its liability.

IV. The check "holders" unconstitutionally were left without an effective remedy.

The effect of the Second Circuit's decision upholding FRB's egregious conduct is to leave the holders remedyless, and take their property without Due Process of Law in violation of U.S. Constitution Amended Articles V and XIV.

The NY Uniform Commercial Code exempts the "sender" bank from any liability to the depositor—*i.e.*, the "holder" or "owner"—of a returned check except for "lack of ordinary care" by the "sender" bank (UCC §4-103 & 4-202). Since FRB disclaims any liability, except to a "sender" bank, and since the "sender" bank is only an agent for collection, the FRB thereby creates its own immunity from any delay.

Thus, where as here, the "sender" bank forwards the check to the FRB within one banking day of its receipt of the check from the "holder", and returns the check within one banking day of its return by the FRB to the "sender" bank, the "sender" bank is not liable to the "holder" despite the FRB's two week delay in the middle of the check clearing "chain."

Here, many of the "sender" banks, including other FRB Districts, protested the NY FRB's return of the long delayed checks and redeposited them. The lead case checks were twice deposited in the "sender" bank, and twice returned by the FRB, *viz.*, on December 5th and 7th, after a 14 day delay, and a further 2 days' delay, respectively.

The "sender" bank has done nothing wrong, and can forcefully assert its innocence under the UCC Banking Code. It promptly, and within one banking day, processed and passed each check on to the FRB.

Likewise, when the check was returned by the FRB, it likewise promptly processed it and returned it to the holder within one day.

In any event, Petitioner joined the lead-case "sender" bank, and, when the FRB belatedly raised the "sender only" defense 12 years into the litigation, Petitioners vainly sought leave to join all other sender banks. The FRB opposed such relief, and neither the District Court, nor the Second Circuit gave it serious consideration.

Conclusion

For the foregoing reasons Petitioners submit that the Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review, reverse and remand its decision affirming the District Court's grant of summary judgment.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, dated and filed January 18, 1989, affirming the District Court's dismissal of the action.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 141—August Term, 1988

(Argued October 14, 1988 Decided January 18, 1989)

Docket No. 88-7328

GREATER BUFFALO PRESS, INC., Individually, and as payee and holder and on behalf of each other similarly situated payee and holder on *Appendix A*; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A. (Formerly THE LINCOLN FIRST BANK),

Plaintiffs-Appellants,

—v.—

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York Branch thereof; JOHN T. KEAN, Individually, and as Officer and Manager thereof,

Defendants-Appellees.

Before:

MESKILL, KEARSE and MAHONEY,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York, Curtin, *C.J.*, granting the defendants' motion for summary judgment and dismissing the plaintiffs' complaint.

Affirmed.

ARNOLD WEISS, Buffalo, New York (Raichle, Banning, Weiss & Stephens, Buffalo, New York, of counsel), *for Appellants*.

THOMAS C. BAXTER, JR., Associate General Counsel, Federal Reserve Bank of New York, New York City (Ernest T. Patrikis, General Counsel, Steven T. Smith, Federal Reserve Bank of New York, New York City, Brian J. Troy, Ronald A. Huebsch, Jaeckle, Fleischmann & Mugel, Buffalo, New York, of counsel), *for Appellees*.

MESKILL, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Western District of New York, Curtin, *C.J.*, granting the summary judgment motion of the Federal Reserve Bank of New York (Fed NY) and John T. Keane and dismissing the complaint.

The suit also included as a defendant Marine Midland Bank, N.A. (Marine). Marine's own motion for dismissal was granted by the district court; plaintiffs do not appeal

from this decision. The sixty-five plaintiffs alleged that they had suffered injury because of defendants' participation in the processing of checks belonging to the plaintiffs.

We affirm.

BACKGROUND

A. *Federal Reserve Banks and the Process of Check Collection*

Federal Reserve Banks play a major role in the nation's system of check collection. *See* The Comptroller General, Report to the Congress: The Federal Reserve Should Move Faster to Eliminate Subsidy of Check Clearing Operations 4 (1982) (the Federal Reserve collects over forty percent of the checks written in the United States), J. App. 935, 936; Clarke, *Check-Out Time for Checks*, 21 Bus. Law. 931, 932 (1966) (one-third of checks are sent to Federal Reserve Banks), J. App. 793, 795. The check collection process, or specifically Fed NY's participation in it, is at the center of this dispute. For that reason, we briefly examine some background. *See generally* H. Hutchinson, *Money, Banking, and the United States Economy* 117-27 (5th ed. 1984); Baxter and Patrikis, *The Check-Hold Revolution*, 18 U.C.C. L.J. 99, 114-17 (1985), J. App. 751, 766-69.

When payment is made by means of a check, a payor draws the check against an account at his or her bank, the payor bank. Upon receiving the check, the payee will often deposit it in his or her own bank, the depositary bank. At this point, two processes must occur. First, the check itself must be physically transported from the depositary bank to the payor bank. Second, payment must be made from the payor bank back to the depositary bank.

One option available to the depositary bank is to utilize the check clearing services of the Federal Reserve System. In order to do so, the depositary bank must send the check to the Federal Reserve Bank for its district. If the payor bank is in the same district, then the Federal Reserve Bank can present the check directly to the payor bank. If the payor bank is located in a different district, the Federal Reserve Bank receiving the check will forward it to the Federal Reserve Bank for the payor bank's district. That Federal Reserve Bank will then present the check to the payor bank.

In addition to effecting the physical delivery of the check, the Federal Reserve System also serves to facilitate payment between the payor and depositary banks. After sending a check to its Federal Reserve Bank for processing, the depositary bank will receive credit for the check in its reserves account with the Federal Reserve. This credit will be given usually within one or two days, depending on how long it is expected to take the check to reach the payor bank for payment. After the check reaches the payor bank, the Federal Reserve System uses transfers of credit through an Interdistrict Settlement Fund to achieve payment.

If there is an unexpected delay in transporting the check to the payor bank, then the credit for the check will be given by the Federal Reserve to the depositary bank before payment can be received from the payor bank. This so-called "float" in effect gives the depositary bank an interest-free advance at the expense of the Federal Reserve. Thus, delays in processing not only adversely affect Federal Reserve Banks with respect to the competitive attractiveness of their check clearing services, but also

result in direct economic costs, *see* Baxter and Patrikis, *supra* at 117, J. App. at 769.

Throughout most of its history, the Federal Reserve has provided these check clearing services only to member banks, or other banks that maintained reserve accounts with the Federal Reserve. *See Jet Courier Services, Inc.* v. *Federal Reserve Bank of Atlanta*, 713 F.2d 1221, 1222-23 (6th Cir. 1983); *Carson* v. *Federal Reserve Bank of New York*, 172 N.E. 475, 478 (N.Y. 1930) (Cardozo, *C.J.*); 14 Fed. Reserve Bull. 80 (1928). These services were provided at no charge, apparently to promote Federal Reserve membership by compensating member banks for the costs associated with having to maintain non-interest bearing reserves with the Federal Reserve. *See Oversight on the Payments Mechanism, the Federal Reserve's Role in Providing Payments Services, and the Pricing of Those Services: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 120-21 (1977) (testimony of Philip E. Coldwell) (hereinafter *Coldwell testimony*), J. App. 944, 954-55. In 1980, however, Congress enacted the Monetary Control Act of 1980, Pub. L. 96-221 tit. I, 94 Stat. 132, 132-41. This Act provided, *inter alia*, that all banks in the United States would be required to maintain reserves with the Federal Reserve. Additionally, check clearing services were now to be made available to all banks, regardless of whether or not they were member banks, but all banks would henceforth have to pay for the service. *See Jet Courier Services*, 713 F.2d at 1222-23; McNeill and Rechter, *The Depository Institutions Deregulation and Monetary Control Act of 1980*, 66 Fed. Reserve Bull. 444, 444-48 (1980), J. App. 908, 908-12.

B. *The Facts Leading to This Litigation*

In 1977, the sixty-five plaintiffs-appellants were all supplier-creditors of Neisner Brother's, Inc. (Neisner), a retail department store chain. The dispute in this case arises from seventy-five checks drawn by Neisner, in October and November of 1977, on its account at Lincoln First Bank of Rochester (Lincoln) and made payable to the appellants. After receiving the checks, the appellants deposited them at their various depositary banks around the country. Greater Buffalo Press, for example, maintains that it deposited one check for $43,537.66 on November 21, 1977 and one check for $109,671.55 on November 23, 1977 in its account at Marine.

After receiving the checks, the various depositary banks forwarded them for collection to the defendant-appellee Fed NY, either directly or indirectly, through other Federal Reserve Banks. The district court accepted Fed NY's contentions as to the dates it received the checks.[1] The court found that Fed NY received three of the seventy-five checks between November 19-22, nine of the checks between November 24-25 and sixty-three of the checks on or after November 26.

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1 In accepting the dates offered by Fed NY, the district court rejected plaintiffs' counsel's argument that these dates were incorrect. Plaintiffs' counsel asked for and was given permission to file a compilation of his version of the dates Fed NY received the checks, but counsel did not do so. In this appeal, the appellants now offer such a compilation, maintaining, essentially, that most of the checks were received one day earlier than Fed NY contends. Fed NY asks us not to consider this showing, arguing that it cannot properly be considered part of the record.

In view of our disposition of this case, *see infra*, this factual dispute is immaterial, and therefore it does not affect the propriety of the granting of summary judgment.

The next step in the collection process called for Fed NY's Buffalo Branch to forward the checks to the payor bank, Lincoln, for payment. The parties are in substantial agreement as to the days the checks were finally received by Lincoln, and Fed NY concedes that there were delays due to an "unprecedented" increase in the volume of checks requiring processing, Br. of Defendants-Appellants at 12. For example, the $43,537.66 check payable to Greater Buffalo Press was received by Fed NY on either November 21 or 22, but was not presented to Lincoln until December 5, J. App. at 566.

Neisner filed a petition for bankruptcy December 1, 1977. The district court found that Lincoln had begun to dishonor the checks of Neisner on November 29, but the appellants maintain that Lincoln only began to dishonor Neisner's checks after learning of the filing of the bankruptcy petition on the morning of December 1.[2] When the checks were presented for payment, Lincoln dishonored them. The checks were returned to Fed NY, and from there back to the appellants' depositary banks. In at least some cases, a second attempt at collection was made, but the checks were again dishonored by Lincoln.

C. *The Litigation*

We briefly summarize the prolonged history of this litigation. The plaintiffs filed their first complaint on January 11, 1978, naming as defendants Fed NY, John T. Keane, manager of Fed NY's Buffalo Branch, and other unnamed officers of that bank. Generally, the plaintiffs' claim was that their checks were dishonored because of deficiencies in the defendants' check processing. An

2 These disputed facts might be relevant to issues of causation, but again, *see* n.1 *supra*, this dispute is immaterial in light of our analysis of the governing law, *see infra*.

amended complaint was filed on May 8, 1978, adding Marine, Greater Buffalo Press' depositary bank, as a defendant, and dropping the reference to unnamed officers. Discovery began, and the plaintiffs subsequently moved for class certification and summary judgment in April 1980. The motion for class certification would ultimately be denied, but counsel for Greater Buffalo Press was permitted to proceed as counsel for all plaintiffs. *See* J. App. at 1521 & n.11.

On December 31, 1980, the district court struck portions of the complaint. The court noted that "[t]he precise legal theory on which the complaint proceeds . . . cannot be determined from the complaint . . . . Plaintiff continues to insist on a panoply of alternative theories, despite the fact that the case has now been in discovery for a considerable period." J. App. at 395. The court nevertheless permitted the plaintiffs to replead with greater specificity. *Id.* at 404.

In September 1981, the plaintiffs filed a "Proposed Second Amended Complaint." Without addressing defendants' objections to this complaint, the district court encouraged the parties to conduct settlement discussions. Such discussions proved unsuccessful. Several years later, on August 15, 1986, the plaintiffs filed, with the permission of the district court, their final complaint, the "New Second Amended Complaint."

On February 18, 1987, Fed NY and Keane filed a motion seeking dismissal of the complaint or, in the alternative, summary judgment. Marine also moved for dismissal. On May 29, 1987, the plaintiffs cross-moved for summary judgment or for leave to amend their complaint to add as defendants other depositary banks, forwarding banks and presenting banks in addition to Marine.

The district court heard argument on November 6, 1987, and issued its decision and order on March 17, 1988. The court granted both the summary judgment motion of defendants Fed NY and Keane and Marine's dismissal motion. The entire complaint was thus dismissed.

The plaintiffs filed a Notice of Appeal on April 15, 1988 purporting to challenge all aspects of the district court judgment. Subsequently, the parties filed with this Court a stipulation dropping Marine from this appeal. Thus, the only issue we need consider is whether the district court erred in granting the summary judgment motion of the Fed NY and Keane. *See, e.g., Ryder Energy Distribution Corp.* v. *Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984); *United States* v. *Banerman*, 552 F.2d 61, 63 n.2 (2d Cir. 1977).

DISCUSSION

In reviewing this matter, we must ask whether the record, read in the light most favorable to the appellants, reveals the existence of any material issue of fact and whether the district court properly applied the law. *See City of Yonkers* v. *Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988). The mere existence of some disputed facts will not require reversal. The disputed facts must be material. As the Supreme Court has said: "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 248 (1986); *see also Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir.

1988). We thus examine first the "substantive law applicable in the case." *Id.*

A. *Governing Law with Respect to Liability*

1. *The Legal Basis for the Cause of Action*

The crux of appellants' complaint is that but for Fed NY's delays in processing their checks, the appellants would have been paid because the checks would have arrived at Lincoln in time to be honored. The appellants have cited Fed NY's assurance to the public of prompt and efficient check clearing services, contending that it was all the while sitting on a mountain of checks that continuously grew faster than Fed NY could process them. They contend that Fed NY foresaw or should have foreseen the processing delays and should have either remedied the situation or warned its customers of potential problems. Instead, the appellants contend, Fed NY sought to cover up the situation.

While constantly pressing a broad censure of Fed NY's operations, the appellants' specific legal theory supporting their first amended complaint remained unclear. Nearly three years after the commencement of this action, the district court was still dealing with this problem patiently, giving appellants every opportunity to replead with greater specificity. *See* J. App. at 404. More than six years later, the appellants' position remained imprecise if not evasive, characterizing their cause of action as including "basic tort and contract claims . . . including tort, fraud, conversion, breach of contract, etc." J. App. at 1061.

It is obvious that the appellants cannot recover against Fed NY by simply criticizing its operations. In order to survive a summary judgment motion, the appellants had to present supporting facts and arguments showing some

legal basis for liability on the part of the defendants; it was not enough simply to put forth conclusory allegations of wrongdoing. *See Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980); *Securities and Exchange Commission* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978).

We agree with the district court's approach in viewing the cause of action on this record as sustainable only by reliance on the provisions of New York's Uniform Commercial Code that deal specifically with the duties of banks in collecting and processing checks. *See* N.Y. U.C.C. §§ 4-201, 4-202 (McKinney 1964). The district court found meritless the appellants' arguments as to possible alternative theories of liability. *See* J. App. at 1520 & nn.8 & 9. We too are unable to discern from the record any other legal basis for liability on the part of Fed NY or Keane. To the extent that the facts might support some other conceivable basis for such liability, we find that the appellants' unsubstantiated conclusory allegations of wrongdoing were properly considered by the district court to have been insufficient to survive the summary judgment motion.

2. *Liability Under The New York Uniform Commercial Code*

The New York Uniform Commercial Code, section 4-202(1) imposes certain duties on "collecting bank[s]." Three of these duties on a quick reading might seem relevant to the facts of this case. The Code provides:

> A collecting bank must use ordinary care in
>
> (a) presenting an item or sending it for presentment; and
>
> (b) sending notice of dishonor or non-payment or returning an item . . . to the bank's transferor or

> directly to the depositary bank . . . after learning that the item has not been paid or accepted, as the case may be; and
>
> . . . .
>
> (e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

N.Y. U.C.C. § 4-202(1). Fed NY does not contest that, as a "collecting bank," these provisions apply to its processing of checks.

This provision imposes on Fed NY a duty of ordinary care in its presentment of checks for payment. The focus of the appellants' complaint is Fed NY's delay, after having received the checks, in presenting them to Lincoln. They base their cause of action in part on the contention that Fed NY breached its duty and that the breach caused the dishonor of their checks. If applicable to this case, Fed NY would bear the burden of showing that it exercised ordinary care in processing the checks if the checks were not properly processed within the "midnight deadline." *See* N.Y. U.C.C. § 4-202(2).

Section 4-202(1)(b) requires collecting banks to give prompt notification of the dishonor of checks. This provision has no application to this case, however. Appellants have not shown or even argued that Fed NY delayed in providing notification of Lincoln's dishonor of the checks. Rather, their alleged injury stems from the dishonor itself, not from any delay in notification of the dishonor. *Cf. Washington Petroleum and Supply Co.* v. *Girard Bank*, 629 F.Supp. 1224, 1226 (M.D. Pa. 1983) (allegation of injury from delayed notification of dishonor).

Section 4-202(1)(e) requires collecting banks to give prompt notice to a transferor of any "loss or delay in transit." At oral argument, the appellants relied on this section, contending that Fed NY at the very least should have alerted the appellants to the delays in the processing of their checks, thus giving them an opportunity to arrange alternative means of processing.

The appellants have not shown, and we have serious doubt as to whether they would be able to show, how a failure to warn of the delays would be causally linked to the dishonor of the checks. A trier of fact would have to question whether the appellants, armed with notice of the processing delay but without the benefit of hindsight or advance warning of Neisner's bankruptcy petition, would have either retrieved their checks from Fed NY or arranged for alternative clearinghouse services. In our review of a grant of summary judgment, however, we do not rely on these weaknesses in the appellants' case. Rather, we simply note that the appellants have no cause of action on these facts based on section 4-202(1)(e). That section applies where delays were caused by "mishaps in the mails," not to delays caused by the collecting bank's own internal processing operations, the situation present in our case. *See United States Fidelity and Guaranty Co.* v. *Federal Reserve Bank of New York*, 590 F.Supp. 486, 494 (S.D.N.Y. 1984) (citing *Northpark National Bank* v. *Bankers Trust Co.*, 572 F.Supp. 524, 531 (S.D.N.Y. 1983)), *aff'd*, 786 F.2d 77 (2d Cir. 1986) (per curiam).

Thus, we find that the only duty created by section 202(1) that is relevant here is Fed NY's duty of ordinary care in the presentment of checks under section 4-202(1)(a). But, in order to recover under this section, the

appellants must show more than Fed NY's breach of duty. They also must show that the duty extended to them.

Section 4-201 of the Uniform Commercial Code says: "Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final . . . the bank is an agent or subagent of the owner of the item." As the Fifth Circuit has recognized: "The agency relationship established by § [4-201] is the only basis in the Code for determining to whom the duties imposed on collecting banks [by § 4-202(1)] run. Once that agency relationship is severed, the duties are no longer owed. More simply stated, *liability flows only from agency status.*" *Childs* v. *Federal Reserve Bank*, 719 F.2d 812, 814 (5th Cir. 1983) (per curiam) (emphasis added). The appellants' cause of action thus rests solely on an agency theory, and their complaint must stand or fall on their contention that Fed NY acted as their agent.

3. *The Effect of Federal Regulation J*

In considering the availability to the appellants of a cause of action based on the U.C.C., we have thus far considered only New York state law. As required by the Supremacy Clause, U.S. Const. art. VI, however, the state U.C.C. statutes cannot be considered in isolation but instead must be read together with applicable federal statutes and regulations. *See United States Fidelity*, 590 F.Supp. at 489 n.4, *aff'd per curiam*, 786 F.2d 77.

The Board of Governors of the Federal Reserve System promulgates regulations governing the operation of the Federal Reserve System. *See* 12 C.F.R. §§ 201-269b (1988). Pursuant to its authority under 12 U.S.C. §§ 248(i), 248(o), 342, 360 (1982) and other laws, the Board of Governors has promulgated Regulation J, con-

cerning the collection of checks. *See* 12 C.F.R. § 210.1 (1988); 14 Fed. Reserve Bull. 80 (1928). The appellants have not called into question the Board of Governors' authority to promulgate regulations, nor the propriety of the promulgation of this particular regulation. *See Childs*, 719 F.2d at 815. Thus, as a properly promulgated substantive regulation, Regulation J must be given the force and effect of federal law. *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-96 (1979).

At the time the actions relevant to this litigation occurred, Regulation J said, in part:

> A Federal Reserve Bank will act only as the agent of the sender in respect of each cash item or noncash item received by it from the sender . . . . A Federal Reserve Bank will not act as the agent or the subagent of any owner or holder of any such item other than the sender. A Federal Reserve Bank shall not have, nor will it assume, any liability to the sender in respect of any such item and its proceeds except for its own lack of good faith or failure to exercise ordinary care.

12 C.F.R. § 210.6(a) (1977) (footnote omitted), J. App. at 528. In so restricting the potential liability of the Federal Reserve Banks with "the sender rule," the regulations also provided: "The term "sender," in respect of an item, means a member bank, a nonmember clearing bank, a Federal Reserve Bank, an international organization, or a foreign correspondent." 12 C.F.R. § 210.2(e) (1977); J. App. at 525. The appellants do not and cannot claim to be "senders" under Regulation J. They simply do not fall within the definition of section 210.2(e).

The application of Regulation J to this case is straightforward. The appellants' cause of action against Fed NY is based entirely on the theory that Fed NY breached duties

required of it as an agent of the appellants in the check collection process. Regulation J unambiguously "severs the agency relationship" between Fed NY and the "nonsender" appellants. *See Childs*, 719 F.2d at 814. Because Regulation J requires that Fed NY not be considered an agent of the appellants, Fed NY cannot be found to have owed the appellants any duty under N.Y. U.C.C. §§ 4-201 and 4-202.

The appellants claim that, properly interpreted, Regulation J merely defines the extent of agency of Federal Reserve Banks and does not limit their liability based on the duty of ordinary care. But the sole basis for liability on the part of Fed NY in this case is agency. Without a duty based on agency, there is no liability. *See Childs*, 719 F.2d at 814.

We believe that this case reveals no basic inconsistency between federal Regulation J and the New York Uniform Commercial Code. While N.Y. U.C.C. §§ 4-201 and 4-202 might suggest a basis for liability here, the New York U.C.C. also provides that: "The effect of the[se] provisions . . . may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care." N.Y. U.C.C. § 4-103(1) (McKinney 1964). The reference to "agreement" is further clarified: "Federal Reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled." N.Y. U.C.C. § 4-103(2). Thus, "[b]y its own terms," New York law provides that Regulation J is to control the rights and duties of the parties here. *See Appliance Buyers Credit Corp.* v. *Prospect National Bank*, 505 F.Supp. 163, 164 (C.D. Ill. 1981),

aff'd, 708 F.2d 290 (7th Cir. 1983); *see also Coldwell testimony* at 117, J. App. at 951 ("The Uniform Commercial Code permits the regulations of the Board and the operating circulars of the Federal Reserve Banks to govern many of the terms and conditions for collection of checks."). By operation of Regulation J and notwithstanding the nonassent of the appellants, the depositary banks and Fed NY agreed to vary the U.C.C. provisions applicable to this case, providing that Fed NY was to act as an agent only of "senders." Fed NY's duty of ordinary care simply did not extend to the appellants, *see Carson*, 172 N.E. at 479, and thus there can be no liability under sections 4-201 and 4-202(1)(a). Nor does the limitation in section 4-103(1) of a bank's power to disclaim the duty of ordinary care aid the appellants. Because Fed NY was not an agent of the appellants, there existed no such duty to be disclaimed.

We note that even if Regulation J were not consistent with New York law here, Regulation J would preempt the inconsistent state law provisions that might otherwise provide for agency liability on the part of Fed NY. As one district court has said in examining the interplay between U.C.C. §§ 4-201, 4-202 and Regulation J:

> The provisions are in conformity when the sender of an item is also its owner; however, when the owner is a remote party, the provisions are in direct conflict. The Reserve bank is either liable to parties more remote than the sender or is not; it cannot be both. Since in this case simultaneous compliance with the federal regulation and the state statute is impossible, the federal law prevails.

Colonial Cadillac, Inc. v. *Shawmut Merchants Bank, N.A.*, 488 F.Supp. 283, 286 (D. Mass. 1980); *see also*

Washington Petroleum and Supply, 629 F.Supp. at 1229-30.[3]

Faced with the clear application of Regulation J, the appellants complain of unfairness and predict calamitous consequences for the future of the transferability and negotiability of commercial paper. With respect to the latter concern, we note that Regulation J is not a recent innovation, *see* 14 Fed. Reserve Bull. 80 (1928); *Carson*, 172 N.E. 475 (1930), and thus far we see no evidence of such dire consequences. Moreover, this limitation of the liability of Federal Reserve Banks has long been supported by sound federal policy. In establishing the Federal Reserve System, Congress showed concern for the nation's costly and circuitous check processing system. Consistent with its goal of creating an equitable and efficient system of exchange, Congress provided for the Federal Reserve to serve as a national clearinghouse for cheeks. *See* H.R. Rep. No. 69, 63rd Cong., 1st Sess. 55-56 (1913); S. Rep. No. 133, 63rd Cong., 1st Sess., pt. 2, at 27 (1913). Soon after its creation, a major concern of the Federal Reserve was to implement federal policy by addressing the check collection problem. *See* W.P.G. Harding, The Formative Period of the Federal Reserve System 38-39, 49-60 (1925). Through their regulatory authority, the Governors of the Federal Reserve sought to establish and maintain "a direct, expeditious, and economical system of check collection and settlement of balances." *See Carson*, 172 N.E. at 478 (quoting Regulation J (series of 1924)); 14 Fed. Reserve Bull. 80; 2 Fed. Reserve Bull. 259 (1916). Regula-

3 Because the appellants' cause of action against Fed NY and Keane is based entirely on an agency theory under N.Y. U.C.C. §§ 4-201 and 4-202(1)(a), we need not consider whether other state law causes of action would be preempted by Regulation J. *See Colonial Cadillac*, 488 F.Supp. at 286 (finding claim based on state consumer protection law preempted).

tion J was an early tool in this endeavor. *See* 14 Fed. Reserve Bull. 80. As noted *supra*, until the enactment of the Monetary Control Act of 1980, check clearing services were provided by Federal Reserve Banks free of charge to member banks in order to ease the burden of Federal Reserve membership. *See Coldwell testimony* at 120-21, J. App. at 954-55. As Fed NY explains: "The sender rule [of Regulation J] was a natural complement to the gratuitous service, because it effectively limited the Reserve Bank's duty to exercise ordinary care to only those institutions who were receiving the gratuitous service, thereby reducing losses as well as the overall cost of the service." Br. of Defendants-Appellees at 24.

This understanding of the policy behind Regulation J finds support in recent changes in the Federal Reserve System. It appears that the Monetary Control Act of 1980 was designed in part to improve the efficiency of the Federal Reserve System and promote competition by other banks and check clearinghouses. *See Bank Stationers Ass'n* v. *Board of Governors*, 704 F.2d 1233, 1236 (11th Cir. 1983); Subcomm. on Domestic Monetary Policy of the House of Representatives Comm. on Banking, Finance and Urban Affairs, 98th Cong., 2nd Sess., Report on the Role and Activities of the Federal Reserve System in the Nation's Check Clearing and Payments System 68-69 (Comm. Print 1984), J. App. 924, 925-26; *see also Jet Courier Services*, 713 F.2d at 1227 (Congress did not intend to protect competitive positions of private collection services). Such a change would undermine an existent "protectionist" policy that supports giving the Federal Reserve Banks the competitive advantage of limited liability under Regulation J. Accordingly, the Board of Governors, in 1986, amended Regulation J and repealed the sender rule in order to

> [p]ermit the owner of a check or other item who is allegedly injured by a Reserve Bank's alleged failure to exercise ordinary care or act in good faith in collecting an item to bring an action against the Reserve Bank, regardless of whether that person is a "sender" as defined in Regulation J.

51 Fed. Reg. 21740 (June 16, 1986), J. App. at 557.

Nevertheless, this change in the law came too late to aid the appellants, whose complaint and supporting evidence must be governed by the law in place in November of 1977. Under that law, Fed NY and its Branch Manager Keane breached no duty to the appellants in this case.

4. *Summary*

The district court reviewed the appellants' complaint and the voluminous record and properly found that Regulation J precludes recovery against the appellees. The appellants had far more than ample time to conduct discovery and to formulate and present a meritorious cause of action against the appellees. Because the appellants have failed to do so, none of the factual disputes in the record are material, and the appellees are entitled to judgment as a matter of law.

B. *Discovery Issues*

The appellants also base their challenge to the grant of summary judgment on their allegations that (1) Fed NY improperly withheld documents in discovery that were subsequently submitted in support of the summary judgment motion, and (2) there were material differences between witness' deposition testimony and affidavits supporting the summary judgment motion. These arguments were made to the district court in detail, *see* J. App. at

1063-70, and the district court rejected them, *see* J. App. at 1521 & nn.8 & 9. We see no abuse of discretion in the district court's rulings. *See Belfiore* v. *New York Times Co.*, 826 F.2d 177, 183-84 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 1030 (1988).

CONCLUSION

The judgment of the district court following an order granting the motion of the appellees-defendants Fed NY and John T. Keane for summary judgment and dismissing the complaint is affirmed.

APPENDIX B

Order and Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and filed March 17, 1988, directing a verdict of dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-27C

GREATER BUFFALO PRESS, INC., individually and as payee and holder; and on behalf of each other similarly situated payee and holder on Appendix A; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A., (Formerly the Lincoln First Bank),

Plaintiffs,

vs.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York, Branch thereof; JOHN T. KEAN, individually, and as an officer and Manager thereof; and MARINE MIDLAND BANK, N.A. (formerly Marine Midland Bank-Western),

Defendants.

APPEARANCES:

RAICHLE, BANNING, WEISS & STEPHENS
(ARNOLD WEISS, ESQ., of Counsel),
Buffalo, New York, for Plaintiffs.

FEDERAL RESERVE BANK OF NEW YORK
(THOMAS C. BAXTER, JR., ESQ., of Counsel),
New York, New York, for Defendants.

There have been extensive motion papers filed in the instant case. Defendants Federal Reserve Bank of New York [FNY] and John T. Kean [Kean] now move to dismiss plaintiffs' second amended complaint (Item 99). Alternatively, they move for summary judgment. *See especially* Items 105-13. Defendant Marine Midland Bank, N.A. [Marine] seeks essentially the same relief. Items 114 and 115. In response, plaintiffs have filed papers in opposition to defendants' motions, as well as for summary judgment on its own behalf. Plaintiffs also seek a court order striking defendants' motions and/or allowing plaintiffs leave to join defendants' agent banks as parties to this lawsuit. *See* Items 121-22. Defendants have filed certain supplementary documents in reply to plaintiffs' papers. *See* Items 123-26, 128.

The factual background of this case can be summarized as follows. This is a case brought by 65 unsatisfied creditors of a bankrupt corporation, Neisner Brothers, Inc. [Neisner], against certain banking institutions as a result of the manner in which these institutions processed checks drawn by Neisner and made payable to plaintiffs for goods and services rendered. These checks were drawn on a demand-deposit account maintained by the bankrupt at Lincoln First Bank [Lincoln First] and were allegedly sent for collection to FNY.

As defendants point out, these checks can be separated into three groups: 1) a group of 63 checks which were received on or after November 26, 1977;[1] 2) a group of 9 checks which were received between November 24-25, 1977; and 3) a group of 3 checks which were received between November 19-22, 1977. All parties acknowledge that Neisner filed its petition for bankruptcy on December 1, 1977. However, Lincoln First began dishonoring checks drawn by Neisner on November 29, 1977.

As is set out in defendants' original memorandum in support of their motions, the 12 Federal Reserve Banks are a part of the Federal Reserve System, the nation's central bank. The Federal Reserve System comprises public and private elements which are corporate instrumentalities whose stock is owned by the member commercial banks within their districts. *See Dixson v. United States,* 465 U.S. 482, 498 (1984); *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System,* 766 F.2d 538, 539-40 (D.C. Cir. 1985). FNY is one of these 12 Federal Reserve Banks and provides a wide range of banking services including, and important for present purposes, check-clearing and collection services. 12 U.S.C. §248a. Defendant FNY says that the collection process typically requires two basic tasks: transportation of the check to the payor bank and passage of credit for the check to the depository bank. *Bank Leumi Trust Company v. Bally's Park Place,* 528 F. Supp. 349 (S.D.N.Y. 1981). Plaintiffs' main claim in this case is that FNY failed to process plaintiffs' checks in a timely fashion. Defendant FNY says that the substantial changes in the manner in which Federal Reserve Banks deliver check-processing services to depository institutions has had legal consequences which affect this case. Item 110, pp. 13-16.

In their second amended complaint, plaintiffs argue that defendants delayed presentment of checks received by plaintiffs from Neisner and that this delay caused plaintiffs monetary losses because of Neisner's filing for bankruptcy on December 1, 1977. Item 99, ¶¶19-20. Citing the case of *United States Fidelity and Guaranty Company v. Federal Reserve Bank of New York*, 590 F. Supp. 486, 489 n.4 (S.D.N.Y. 1984), *aff'd*, 786 F.2d 77 (2d Cir. 1986), defendants say that the New York Uniform Commercial Code [UCC], §4-202 is the principal Code provision at issue in this litigation. This section states, in pertinent part, that:

> 1) a collecting bank must use ordinary care in
>
> (a) presenting an item or sending it for presentment; and
>
> * * *
>
> (e) notifying its transferor of any loss or delay in transmit within a reasonable time after discovery thereof.

Section 4-202 is supplemented by the Board of Governors of the Federal Reserve System's Regulation J. Defendants say that plaintiffs' attempts to read common law and other claims into this case must fail. Item 110, pp. 19-24. Defendants argue that plaintiffs' only colorable claim in this case is its claim that defendant FNY breached its duty under UCC §4-202(1)(a) to use ordinary care in presenting the plaintiffs' checks to Lincoln First and is therefore liable to the plaintiffs for damages proximately caused by that alleged dereliction. Moreover, defendants say that plaintiffs' claim against FNY must also fail because 1) none of the plaintiffs is a "sender" within the meaning of Regulation J; and 2) even if this court were to decide otherwise, FNY is entitled to judgment as a matter of law. These arguments will be set out at greater length below.

Defendant FNY says that Regulation J unambiguously provides that a Reserve Bank handling a check acts as the "sender's" agent, that a Reserve Bank "will not act as the agent or subagent of any owner or holder of such [check] other than the sender," and that a Reserve Bank is liable only to the "sender" for its own lack of good faith or failure to exercise ordinary care. 12 C.F.R. §210.6(a)(1) (1977). "Sender" is defined in Regulation J to mean: "a member bank, a nonmember clearing bank, a Federal Reserve Bank, an international organization or a foreign correspondent." 12 C.F.R. §210.2(e) (1977). Defendant FNY says that, because none of the plaintiffs in this action fits within the above definition, FNY cannot be held liable to any of the plaintiffs under §4-202(1)(a). *E.g., Childs v. Federal Reserve Bank of Dallas,* 719 F.2d 812, 813 (5th Cir. 1983).

Defendant FNY says that the interrelationship of the UCC and the so-called sender rule may be viewed in either of two ways. First, Regulation J may be viewed as preempting the provisions of the UCC which suggest that Federal Reserve Banks may be held liable for negligence to the owner of an item that is improperly handled, even if that owner is not a "sender." *See* UCC §§4-201(1), 4-202 (1)(a). *See especially Colonial Cadillac, Inc. v. Shawmut Merchants Bank, N.A.,* 488 F. Supp. 283, 285 (D. Mass. 1980); *Washington Petroleum & Supply Co. v. Gerard Bank,* 629 F. Supp. 1224 (M.D. Pa. 1983); *Jones v. Rath Packing Co.,* 430 U.S. 519, 525-26 (1977).

Second, defendant FNY says that this court may also properly decide that subsection 1 of §4-103 of the UCC authorizes the variation of the provisions of Article 4 by agreement, as long as the varying bank does not disclaim its responsibility to exercise due care or limit the amount

of damages for its failure to act in a reasonable manner. *See also* UCC §4-103(2) (McKinney's 1964). Pursuant to this reading, it is possible to conclude that there is no inconsistency between §4-201 and §210.6(a) of Regulation J. *Childs v. Federal Reserve Bank of Dallas, supra* at 814.

In either event, defendant FNY says that none of the plaintiffs are "senders" within the meaning of 12 C.F.R. §210.2(e), as it read in 1977, so as to be able to state a claim under §4-202(1)(a) now.

Alternatively, defendant FNY says that it is entitled to judgment as a matter of law on three different grounds. First, it states that 53 of the 65 plaintiffs in this case (involving 63 of the 75 checks) have no actionable damages because of UCC §4-103(5) (McKinney's 1964). This section states that:

> The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

Marcoux v. Van Wyk, 572 F.2d 651, 653-56 (8th Cir. 1978), *cert. denied*, 439 U.S. 810 (1978). Put another way, defendant FNY says that where an item would have been uncollectable had ordinary care been exercised by the collecting bank, then a plaintiff may recover nothing from that bank. UCC §4-103(f), official comment 6 (McKinney's 1964).

Defendant FNY contends that if it had acted with ordinary care in this case by taking proper action with respect to plaintiffs' checks before midnight on the

banking day[2] following the banking day the checks were received (U.C.C. §§4-202(2), 4-104(1)(h)),[3] defendants could not be held liable for damages with respect to 63 of the 75 checks involved in this case. *See* U.C.C. §§1-201(38), 3-504(2)(a) (McKinney's 1964). Defendant FNY says that this is because although defendants were required to present or send these checks by midnight on November 29, 1977, the evidence is undisputed that all checks presented to Lincoln First on November 29, 1977, were dishonored.[4] Accordingly, defendants FNY and Keane say that the "payees" or "holders" of those checks have no actionable damages against them and summary judgment is appropriate.

FNY says that, of the 12 remaining plaintiffs, 9 have no actionable damages if the time extensions authorized by Article 4 are applied. These 9 are checks with a midnight deadline of November 28, 1977. Defendants says that, even if these checks were mailed by this time, the possibility that they would have been delivered to Lincoln First before 3 p.m. on November 29, 1977, is "so speculative" so as to warrant the granting of summary judgment to FNY now.[5]

Moreover, FNY states that although it is conclusively presumed that a collecting bank taking proper action by its midnight deadline has exercised ordinary care, the converse is not conclusively presumed. Instead, a collecting bank may still establish that it has exercised ordinary care, even when it has missed its midnight deadline. UCC §§4-202(2); 4-107; *see especially* §4-108. Section 4-108 states:

> Unless otherwise instructed, a collecting bank in a good faith effort to secure payment may, in the case of specific items and with or without the approval of any person involved, waive, modify or extend time

> limits imposed or permitted by this Act for a period not in excess of an additional banking day without discharge of secondary parties and without liability to its transferor or any prior party.

Given the dramatic increase in the number of checks processed by the Federal Reserve Banks, especially at the beginning of the 1977 Christmas shopping season, FNY says it was entitled to extend the "midnight deadline" for the nine checks by one day until November 29, 1977, and plaintiffs have no actionable claims for them.[6]

Of the three remaining checks,[7] defendant FNY says that the proximate cause of their alleged damages is either a delay that it excusable under federal law or a result of plaintiffs' decision to extend unsecured credit to the bankrupt. Item 110, pp. 40-58.

Defendant Marine's own motion papers raise arguments which are distinct from those raised by defendant FNY. Marine says:

> Essentially, plaintiffs seek to hold Marine vicariously liable for the alleged failure by [FNY] to exercise ordinary care in handling checks which the plaintiffs allegedly deposited into accounts at Marine. Marine, in turn, sent these checks for collection to [FNY].

Item 115, p. 1. Marine says that, assuming this court will grant FNY's motion and dispose of plaintiffs' direct case against the FNY, the court has further authority to deem Marine's cross claim to be a third-party complaint. Marine says that this would enable FNY to assert the complete defense available to Marine under UCC §4-202(3). This section states:

> Subject to subsection (1) (a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank or person or for loss or destruction of an item in transit or in the possession of others.

Put another way, Marine says that each bank, subject to the duty of selecting proper intermediaries, is liable only for its own negligence. Therefore, Marine says the plaintiffs' complaint against Marine should be dismissed for failure to state a claim upon which relief can be granted.

In plaintiffs' responsive papers (especially Item 121), they ask that this court deny defendants' motions for dismissal or grant summary judgment to plaintiffs. Alternatively, plaintiffs ask the court to grant plaintiffs leave to supplement their response and to join as defendants each of the depository, presenting, and forwarding banks with respect to each of plaintiffs' checks.

Each of plaintiffs say that they are entitled to summary judgment because there is sufficient proof to establish plaintiffs' claim of:

> [FNY's] massive "Cover-Up" to conceal a two-week delay in WNY RCPC check clearing in November, 1977, when it secretly stored $2,000,000 in "Hold-Over" checks—for which it had given full credit to presenting Banks—which *thereby* illegally injected *$2 Billion* of "Float" or artificial funds into the U.S. Monetary System, distorted "M-1" and other economic indicies and caused plaintiffs' checks to be returned unpaid . . ..

Item 121, p. 1 (emphasis in original).

Moreover, plaintiffs allege that Greater Buffalo Press [GBP] and the other plaintiffs' April 16, 1980, motion for summary judgment should have been granted by this court. More specifically, plaintiffs argue that if defendants had not delayed GBP's checks—which Marine delivered to them on November 21 and 28, respectively—but had given them the promised "overnight check clearance," the checks would have been delivered to Lincoln First the next day and Lincoln First's time to pay or return them would have expired on November 23 and 30, respectively. Plaintiffs say that this would have been prior to Neisner's reorganization, and prior to Lincoln First's freeze of the old Neisner accounts, and its return of all checks drawn thereon were presented to it on or after November 30, 1977.

Plaintiffs allege that Neisner's and Lincoln First's officials testified that Neisner had ample funds to cover all checks written before this date. However, plaintiffs argue that if defendants had not delayed any plaintiffs' checks which had been delivered on or before November 28, 1987, they would have received "overnight check clearance" and would have been delivered to Lincoln First by November 29, 1977. Plaintiffs say that had it not been for defendants' November, 1977, check-clearing problems, this would have been properly done.[8]

I find all of plaintiffs' many arguments unpersuasive.[9] In light of the language of the decision of the United States Court of Appeals for the Fifth Circuit in *Childs v. Federal Reserve Bank, supra*, as well as that portion of the legislative history attached as Exhibit E of defendants FNY and Keane's original memorandum (Item 11), I find that it is clear that during the time pertinent to this action, a Federal Reserve Bank like the defendant in this case was liable only to the "sender" for

its alleged failure to exercise ordinary care here. UCC §4-202(1)(a); 12 C.F.R. §210.6(a)(1) (1977). This is because Regulation J explicitly severs the agency relationship between a reserve bank and the owner of a check in order to carry out the Congressional policy of establishing a nationwide system of check-clearing and collecting. *Childs v. Federal Reserve Bank, supra*, at 815 (*citing, inter alia, Independent Bankers Ass'n v. Board of Governors of the Federal Reserve*, 500 F.2d 812, 814 (D.C. Cir. 1974).[10]

Second, I believe that plaintiff's claims against defendant Marine also must be dismissed because of plaintiffs' failure to produce any evidence to suggest that Marine was, itself, negligent in any way in the context of this case. UCC §4-202(3) (McKinney's 1964). Plaintiffs' motions for summary judgment, class certification[11] and to add additional defendants are denied.

In summary, defendants' motions for summary judgment are granted in all respects. Plaintiffs' various motions are denied. Plaintiffs' second amended complaint is dismissed.

So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: March 17, 1988

FOOTNOTES

[1] For the present purposes, it is important to note that because November 24, 1977, was Thanksgiving and November 26 and 27, 1977, were weekend days, any checks received on any of these dates are considered received on the following business days (Item 131, pp. 29-30).

[2] According to Article VII of the By-Laws of the Federal Reserve Bank of New York, the business hours of the FNY are 10 a.m. to 3 p.m. every banking day (*see* Item 128).

[3] Defendant FNY notes that the midnight deadline for all but 12 of these checks would have been November 29, 1977. *See* Item 110, p. 34 and Exh. G.

[4] Plaintiffs' attorney argues that only checks presented after 3 p.m. on November 29, 1987, would have been dishonored (Item 131, pp. 64, 83). *But see* Affidavit of Glenn French [French Affidavit], Item 84, pp. 20-21. For present purposes, I will accept the time set forth by Mr. Weiss as correct.

[5] FNY says that the fact that it normally used private couriers, and not the U.S. Mails, is irrelevant here. It says that if this court were to rule otherwise, it would be penalizing FNY for adopting more efficient collection practices than were authorized by the UCC's "safe harbor" provisions. *See also* French Affidavit, pp. 20-21.

[6] These plaintiffs and their checks are 1) American Security Corp., $8,000.00; 2) Artcraft Mills, $8,316.00; 3) Lawtex, $16,660.61; 4) R. A. Plymouth, $4,104.08; 5) Proctor & Gamble Distributing Co., $32,134.75; 6) Dollcraft Industries, Ltd., $13,030.77; 7) Amos. Hosiery Mills, Inc., $9,261.31; 8) Temple Distributors, Inc., $25,000.00; and 9) Dy-Co Management Corp., $7,673.00. The midnight deadline on all of these checks are November 28, 1977. These checks total $124,180.52.

[7] These plaintiffs and their checks are 1) Greater Buffalo Press, $43,537.66, midnight deadline November 23, 1977; 2) E. P. Kirst & Sons, $6,984.20, midnight deadline November 23, 1977; and 3) Auburn Hosiery Mills, $5,210.51, midnight deadline November 22, 1977. These checks total $55,732.37.

[8] Plaintiffs also make a multitude of other arguments, all of which are without merit. Item 121, pp. 13-55.

[9] A review of Item 121, plaintiffs' response, makes clear that many of plaintiffs' arguments are based solely on the unsupported opinion of plaintiffs' attorney.

[10] Were it not for the language of Regulation J, defendants would still be entitled to summary judgment with respect to the 63 checks which were received by FNY on or after November 26, 1977. It is clear that because Lincoln Bank dishonored all checks presented on November 29, 1977, plaintiffs had no actionable claims with respect to these checks. UCC §4-103(5) (McKinney's 1964). Determinations with respect to the remaining 12 checks could not have been made on the papers.

[11] Although plaintiffs' motion for class certification was denied, Mr. Weiss was permitted to go ahead and act as counsel for all plaintiffs identified in Item 110, Exh. G (Attachment 1).

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APPENDIX C

Text of Constitutional Provisions, Statutes and Regulations Involved.

UNIFORM COMMERCIAL CODE
(As Adopted by New York)

Art. 3 COMMERCIAL PAPER

§3—102. Definitions and Index of Definitions

(1) In this Article unless the context otherwise requires

* * *

(d) "Secondary party" means a drawer or endorser.

(e) "Instrument" means a negotiable instrument.

(2) Other definitions applying to this Article and the sections in which they appear are:

* * *

"Check". Section 3—104.

* * *

§3—104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note"

(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

* * *

§3—201. Transfer: Right to Indorsement

(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

* * *

§3—301. Rights of a Holder

The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise provided in Section 3—603 on payment or satisfaction, discharge it or enforce payment in his own name.

§3—414. Contract of Indorser; Order of Liability

(1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument

according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

(2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

Art. 4 BANK DEPOSITS—COLLECTIONS

§4—102. Applicability.

(1) To the extent that items within this Article are also within the scope of Articles 3 and 8, they are subject to the provisions of those Articles. In the event of conflict the provisions of this Article govern those of Article 3 but the provisions of Article 3 govern those of this Article.

(2) The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

§4—103. Variation by Agreement; Measure of Damages; Certain Action Constituting Ordinary Care

(1) The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the

parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled.

(3) Action or non-action approved by this Article or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by this Article, prima facie constitutes the exercise of ordinary care.

(4) The specification or approval of certain procedures by this Article does not constitute disapproval of other procedures which may be reasonable under the circumstances.

(5) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

§4--104. Definitions and Index of Definitions

(1) In this Article unless the context otherwise requires

* * *

(c) "Banking day" means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions;

* * *

(e) "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank;

* * *

(g) "Item" means any instrument for the payment of money even though it is not negotiable but does not include money;

(h) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

* * *

(3) The following definitions in other Articles apply to this Article:

* * *

"Check" Section 3—104.

* * *

"Secondary party" Section 3—102.

§4—202. Responsibility for Collection; When Action Seasonable

(1) A collecting bank must use ordinary care in

(a) presenting an item or sending it for presentment; and

(b) sending notice of dishonor or non-payment or returning an item other than a documentary draft to the bank's transferor or directly to the depositary

bank under subsection (2) of Section 4—212 after learning that the item has not been paid or accepted, as the case may be; and

(c) settling for an item when the bank receives final settlement; and

(d) making or providing for any necessary protest; and

(e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(2) A collecting bank taking proper action before its midnight deadline following receipt of an item, notice or payment acts seasonably; taking proper action within a reasonably longer time may be seasonable but the bank has the burden of so establishing.

(3) Subject to subsection (1) (a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank or person or for loss or destruction of an item in transit or in the possession of others.

Federal Reserve Bank

REGULATION J

(12 CFR 210)

As amended effective September 1, 1977

COLLECTION OF CHECKS AND OTHER ITEMS AND TRANSFERS OF FUNDS

SUBPART A—COLLECTION OF CHECKS AND OTHER ITEMS

* * *

SECTION 210.2—DEFINITIONS

As used in this Subpart, unless the context otherwise requires:

* * *

(b) The term "check" means any draft drawn on a bank and payable on demand.

* * *

(e) The term "sender", in respect of an item, means a member bank, a nonmember clearing bank, a Federal Reserve Bank, an international organization, or a foreign correspondent.

* * *

(i) The term "cash item" means:

(1) Any check other than a check classified as a noncash item in accordance with paragraph (j) of this section; or

(2) Any other item payable on demand and collectible at par which the Federal Reserve Bank of the district in which the item is payable may be willing to accept as a cash item.

* * *

(k) The term "paying bank" means:

(1) The bank by which an item is payable and to which it is presented, unless the item is payable or collectible through another bank and is sent to such other bank for payment or collection; or

(2) The bank through which an item is payable or collectible and to which it is sent for payment or collection.

* * *

(o) The term "banking day" means any day during which a bank is open to the public for carrying on substantially all its banking functions.

SECTION 210.3—GENERAL PROVISIONS

In order to afford both to the public and to the banks of the country a direct, expeditious, and economical system for the collection of items and the settlement of balances, each Federal Reserve Bank shall receive and handle cash items and noncash items in accordance with the terms and conditions set forth in this Subpart; ***

SECTION 210.6—STATUS AND WARRANTIES OF FEDERAL RESERVE BANK

(a) A Federal Reserve Bank will act only as the agent of the sender in respect of each cash item or noncash item received by it from the sender, but such agency shall terminate not later than the time when the Federal

Reserve Bank shall have received payment for the item in actually and finally collected funds and shall have made the proceeds available for withdrawal or other use by the sender. A Federal Reserve Bank will not act as the agent or the subagent of any owner or holder of any such item other than the sender. A Federal Reserve Bank shall not have, nor will it assume, any liability to the sender in respect of any such item and its proceeds except for its own lack of good faith or failure to exercise ordinary care.[3]

* * *

SECTION 210.9—REMITTANCE AND PAYMENT

(a)(1) Cash item. A paying bank becomes accountable for the amount of each cash item received by it from or through a Federal Reserve Bank at the close of the paying bank's banking day on which the cash item was so received if it retains such item after the close of such banking day, unless, prior to such time, it pays or remits for the item as herein provided. ***

---

[3] No Federal Reserve Bank shall be responsible to the sender of any cash item, or any other owner or holder thereof, for any delay resulting from the action taken by the Federal Reserve Bank in presenting, sending, or forwarding the item on the basis of (*a*) any A.B.A. transit number or routing symbol appearing thereon at the time of its receipt by the Federal Reserve Bank, whether inscribed by magnetic ink or by any other means, and whether or not such transit or routing symbol is consistent with each other form of designation of a paying bank (or nonbank payor) then appearing thereon, or (*b*) any other form of designation of a paying bank (or nonbank payor) then appearing thereon, whether or not consistent with A.B.A. transit number or routing symbol then appearing thereon.

SECTION 210.10—TIME SCHEDULE AND AVAILABILITY OF CREDITS WITH RESPECT TO CASH ITEMS

(a) Each Federal Reserve Bank shall include in its operating letters a time schedule for each of its offices when the amount of any cash item received by it from any sender or sent by any sender to another Federal Reserve office for the account of such Federal Reserve Bank will be counted as reserve for the purposes of Part 204 of this chapter (Regulation D) and become available for withdrawal or other use by the sender. ***

SECTION 210.13—CHARGEBACK OF UNPAID CASH ITEMS AND NONCASH ITEMS

If a Federal Reserve Bank does not receive payment for any cash item in accordance with the provisions of §210.9(a), the amount of such item may be charged back to the sender, regardless of whether or not the item itself can be resumed. *** In the event the amount of the item is charged back, neither the owner or holder of any such item nor the sender shall have the right of recourse upon, interest in, or right of payment from, any reserve balance, clearing account, deposit account, or other funds of the paying bank or of any collecting bank, in the possession of the Federal Reserve Bank. ***

SECTION 210.14— TIMELINESS OF ACTION

If, because of interruption of communication facilities, suspension of payments by another bank, war, emergency conditions or other circumstances beyond its control, any bank (including a Federal Reserve Bank) shall be delayed beyond the time limits provided in this

Subpart or the operating letters of the Federal Reserve Banks, or prescribed by the applicable law of any State in taking any action with respect to a cash item or a noncash item, including forwarding such item, presenting it or sending it for presentment and payment, paying or remitting for it, returning it or sending notice of dishonor or nonpayment, or making or providing for any necessary protest, the time of such bank, as limited by this Subpart or the operating letters of the Federal Reserve Banks, or by the applicable law of any State, for taking or completing the action thereby delayed shall be extended for such time after the cause of the delay ceases to operate as shall be necessary to take or complete the action, provided the bank exercises such diligence as the circumstances require.

SECTION 210.59—TIME LIMITS

(a) Each Federal Reserve Bank shall include in its operating circulars a schedule of the time limits showing, with respect to interdistrict, interoffice, and intraoffice transfers of funds, the hours on each business day during which it will receive and handle transfer items and requests for transfer items.

(b) Each Federal Reserve Bank taking proper action on the day of receipt of a transfer item or request for a transfer item acts seasonably; taking proper action within a reasonably longer time may be seasonable but the Federal Reserve Bank has the burden of so establishing. In order for action to be taken on the day of receipt, such items or request must reach the Federal Reserve Bank not later than the time shown in its schedule of time limits. No representation shall be made by a Federal Reserve Bank to the effect that transfers of funds will be consummated on the day requested.

(c) In emergency or other unusual circumstances, a Federal Reserve Bank may, in its discretion, receive transfer items and requests for transfer items after the hours shown in its schedule of time limits. ***

SECTION 210.63—TIMELINESS OF ACTION

If, because of circumstances beyond its control, a Federal Reserve Bank shall be delayed beyond applicable time limits provided in this Subpart or in the operating circulars of the Federal Reserve Bank or by law in taking any action with respect to a transfer item or a request for a transfer item, the time within which such action shall be completed shall be extended for such time after the cause of the delay ceases to operate as shall be necessary to take or complete the action, provided the Bank exercises such diligence as the circumstances require.

SECTION 210.64—LIABILITY OF A FEDERAL RESERVE BANK

(a) A Federal Reserve Bank, in connection with the matters specified in this Subpart or its operating circulars, shall not have, nor shall it assume, any responsibility to a transferee, a beneficiary, or any other party, except its immediate transferor, nor shall a Federal Reserve Bank have or assume any liability except for its own or another Federal Reserve Bank's lack of good faith or failure to exercise ordinary care, and, except as herein provided, a Federal Reserve Bank shall not be liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person, including a transferor.

* * *

(c) Subject to the limitations on liability stated above, if the failure to credit the amount of the transfer item or request for a transfer item to the account maintained or used by the transferee resulted from a failure on the part of any Federal Reserve Bank to exercise ordinary care or to act in good faith, the transferor shall have the right to recover from its Federal Reserve Bank any damages proximately caused by such failure: *Provided, however,* That whether any consequential damages are proximately caused by the Federal Reserve Bank's failure to exercise ordinary care or lack of good faith is a question of fact to be determined in each case. ***

Title 12, U.S. Code:

BANKS AND BANKING

POWERS AND DUTIES OF FEDERAL RESERVE BANKS

§341. General enumeration of powers

Upon the filing of the organization certificate with the Comptroller of the Currency a Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power—

* * *

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity.

* * *

Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

CIVIL LIABILITY OF FEDERAL RESERVE AND MEMBER BANKS, SHAREHOLDERS, AND OFFICERS

§501. Liability of Federal reserve or member bank for certifying check when amount of deposit was inadequate

It shall be unlawful for any officer, director, agent, or employee of any Federal reserve bank, or any member bank as defined in this chapter, to certify any check drawn upon such Federal reserve bank or member bank unless the person, firm, or corporation drawing the check has on deposit with such Federal reserve bank or member bank, at the time such check is certified, an amount of money not less than the amount specified in such check. Any check so certified by a duly authorized officer, director, agent, or employee shall be a good and valid obligation against such Federal reserve bank or member bank; ***

§342. As in effect in 1977

§342. Deposits; exchange and collection; member and nonmember banks; charges

Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing notes and bills; or, solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal reserve banks, and checks and drafts, payable upon presentation within its district, and maturing notes and bills payable within its

district; or, solely for the purposes of exchange or of collection, may receive from any nonmember bank or trust company deposits of current funds in lawful money, national-bank notes, Federal reserve notes, checks and drafts payable upon presentation, or maturing notes and bills: *Provided*, Such nonmember bank or trust company maintains with the Federal reserve bank of its district a balance sufficient to offset the items in transit held for its account by the Federal reserve bank; *Provided further*, That nothing in this or any other section of this chapter shall be construed as prohibiting a member or nonmember bank from making reasonable charges, to be determined and regulated by the Board of Governors of the Federal Reserve System, but in no case to exceed 10 cents per $100 or fraction thereof, based on the total of checks and drafts presented at any one time, for collection or payment of checks and drafts and remission therefor by exchange or otherwise; but, no such charges shall be made against the Federal reserve banks. Dec. 23, 1913, c. 6, §13, 38 Stat. 263; Sept. 7, 1916, c. 461, 39 Stat. 752; June 21, 1917, c. 32, §4, 40 Stat. 234; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704.

1980 AMENDMENTS

PUBLIC LAW 96-221 [H.R. 4986]; MARCH 31, 1980

DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980

SHORT TITLE

SECTION 1. This Act may be cited as the "Depository Institutions Deregulation and Monetary Control Act of 1980".

TITLE I—MONETARY CONTROL ACT OF 1980

* * *

SEC. 105. (a) The first paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 342) is amended—

(1) by inserting "or other depository institutions" after "member banks";

(2) by inserting "or other items" after "payable upon presentation" the first and third place it appears therein;

(3) by inserting "or other items" after "payable upon presentation within its district";

(4) by inserting "or other depository institution" after "nonmember bank or trust company" each place it appears therein;

(5) by striking out "sufficient to offset the items in transit held for its account by the Federal reserve bank" and inserting in lieu thereof "in such amount as the Board determines taking into account items in transit, services provided by the Federal Reserve bank, and other factors as the Board may deem appropriate"; and

(6) by inserting "or other depository institution" after "prohibiting a member or nonmember bank".

APPENDIX D

List of Each of the Plaintiff Corporations, Together with Their Respective Parent Corporations and Non-Wholly Owned Subsidiaries and Affiliates

LIST OF EACH OF THE PLAINTIFF CORPORATIONS, TOGETHER WITH THEIR RESPECTIVE PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

Petitioner	*Parent Co.*	*Non-Wholly Owned Subsidiaries*
Greater Buffalo Press, Inc.	GBP Industries, Inc. (Greater Buffalo Press, Inc. has now been merged into GBP Industries, Inc. and is a wholly-owned division thereof)	National Inserting Systems, Inc.
E. P. Kirst & Sons, Inc.	none	none
Mardon Gardens		
American Security Corp.		
Orchard Yarn & Thread Company, Inc.	none	none
Broadway Supply Co., Inc.		
Union Sun & Journal, Inc.	none	none
Niagara Hobby Distributors, Inc.	no longer involved	
Auburn Hosiery Mills, Inc.	none	none
Tolona Pizza Products Corp.	none	none
Trust Co. of George	Suntrust Banks, Inc.	none
P. A. Plymouth, Inc.		
Ullman Co., Inc.	none	none
Huffman Manufacturing Co.		
Harris & Covington Hosiery Mills, Inc.	none	none

Petitioner	*Parent Co.*	*Non-Wholly Owned Subsidiaries*
Gindi International	unable to obtain information	
Proctor & Gamble Distributing Company	The Proctor & Gamble Company	none
Oakdell, Inc.		
Lambert of Arkansas, Inc.		
Park Newspapers of St. Lawrence, Inc.		
E. J. Brach & Sons		
McDonald Air Conditioning Service, Inc.		
Gloray Knitting Mills		
McGrath & Hamin, Inc.	Consolidated Jewelry	none
Evening Telegram	Thompson Newspapers of New York State	none
Marvin Accessories, Inc.		
Dollcraft Industries, Ltd.	none	none
Teters Floral Products Co., Inc.	Hanson Industries	none
Amos Hosiery Mills		
Bee Gee Distributing Corp.		
PPG Industries, Inc.		
Riegel Textile Corp.	no longer involved	
The Coleman Company, Inc.		
Temple Distributors, Inc.		
The Anderson Rubber Co.	none	none
Dy-Co Management Corp.		
H & K Distributing, Inc.	none	none
Hamburg Pennysaver, Inc.	none	none
Henry Lee Co.	none	none
Bank of Palm Beach & Trust Company		

Petitioner	*Parent Co.*	*Non-Wholly Owned Subsidiaries*
Republican Publishing Co. (now Progressive Communications Corp.)	none	none
Mount Vernon News (is a Div. of Progressive Communications Corp.)	none	none
Emerson Radio Corp.		
Quaker State Oil	none	none
Leonard L. Farber Co.	none	none
Texstar Automotive	no longer involved	
Mrs. Smith's Frozen Foods Co.	Kellogg Company	none
Lafayette Brass Co., Inc.	Durst Industries, Inc.	none
Pleasure Knit Corporation	none	none
Cortland Standard Printing Co., Inc.	none	none
Petersen Manufacturing Company, Inc.	American Tool Companies, Inc.	none
Barclay Knitwear Co., Inc.		
Commercial Light Co.	none	none
Cortland County Sanitation Service		
Union Slaughter House		
Capitol Cake Company, Inc.	none	none
United Cutlery, Inc.	none	none
Stickley Corporation	none	none
Charlap's Dairy Farms, Inc.	none	none
Cutler Ridge Assoc.	none	none

APPENDIX E

Petitioner's Exhibit 1

[10]

The
FEDERAL RESERVE SYSTEM

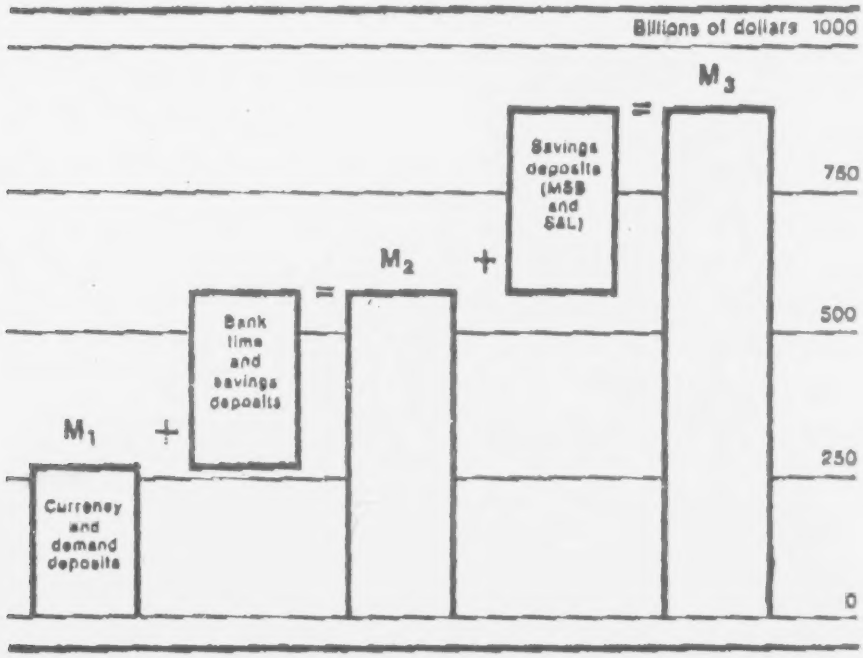
Purposes and Functions

* * *

Economists have not been able to agree on the best definition of money. The Federal Reserve publishes three definitions, and it takes all of them into account in evaluating policy. The three measures are: (a) money narrowly defined (M_1) encompassing only currency and demand deposits held by the nonbank public; (b) money more broadly defined (M_2) including also time and savings deposits at banks, other than large negotiable time certificates of deposit (CD's) ***

CHART 1

MEASURES OF MONEY STOCK — December 1973



M_1: Averages of daily figures for (1) demand deposits of commercial banks other than domestic interbank and U.S. Govt., less cash items in process of collection and F.R. float; (2) foreign demand balances at F.R. Banks; and (3) currency outside the Treasury, F.R. Banks, and vaults of commercial banks.

M_2: Averages of daily figures for M_1 plus savings deposits, time deposits open account, and time certificates other than negotiable CD's of $100,000 of large weekly reporting banks.

M_3: M_2 plus the average of the beginning- and end-of-month figures for deposits of mutual savings banks and for savings capital of savings and loan associations.

* * *

[34] As already noted, this difference, which is sometimes sizable, is called "float." It measures the amount of Federal Reserve credit generated by the national check-collection process and available to the member banks. The application by Reserve Banks of electronic technology to check clearance at regionally located check-processing centers is now working to speed up check settlement. This will gradually reduce the volume of both the asset and liability items and also of Federal Reserve float.

* * *

[40] Since the time actually taken to collect a check may be longer than that allowed in the schedule, this crediting often occurs before the account of the bank on which the check is drawn is debited. The difference between the asset account (cash items in process of collection) and the liability account (deferred availability cash items) represents checks that—although not yet collected by the Reserve Banks—have previously been credited to the reserve accounts of the banks that deposited them.

As already noted, this difference, which is sometimes sizable, is called "float." It measures the amount of Federal Reserve credit generated by the national check-collection process and available to the member banks. The application by Reserve Banks of electronic technology to check clearance at regionally located check-processing centers is now working to speed up check settlement. This will gradually reduce the volume of both the asset and liability items and also of Federal Reserve float.

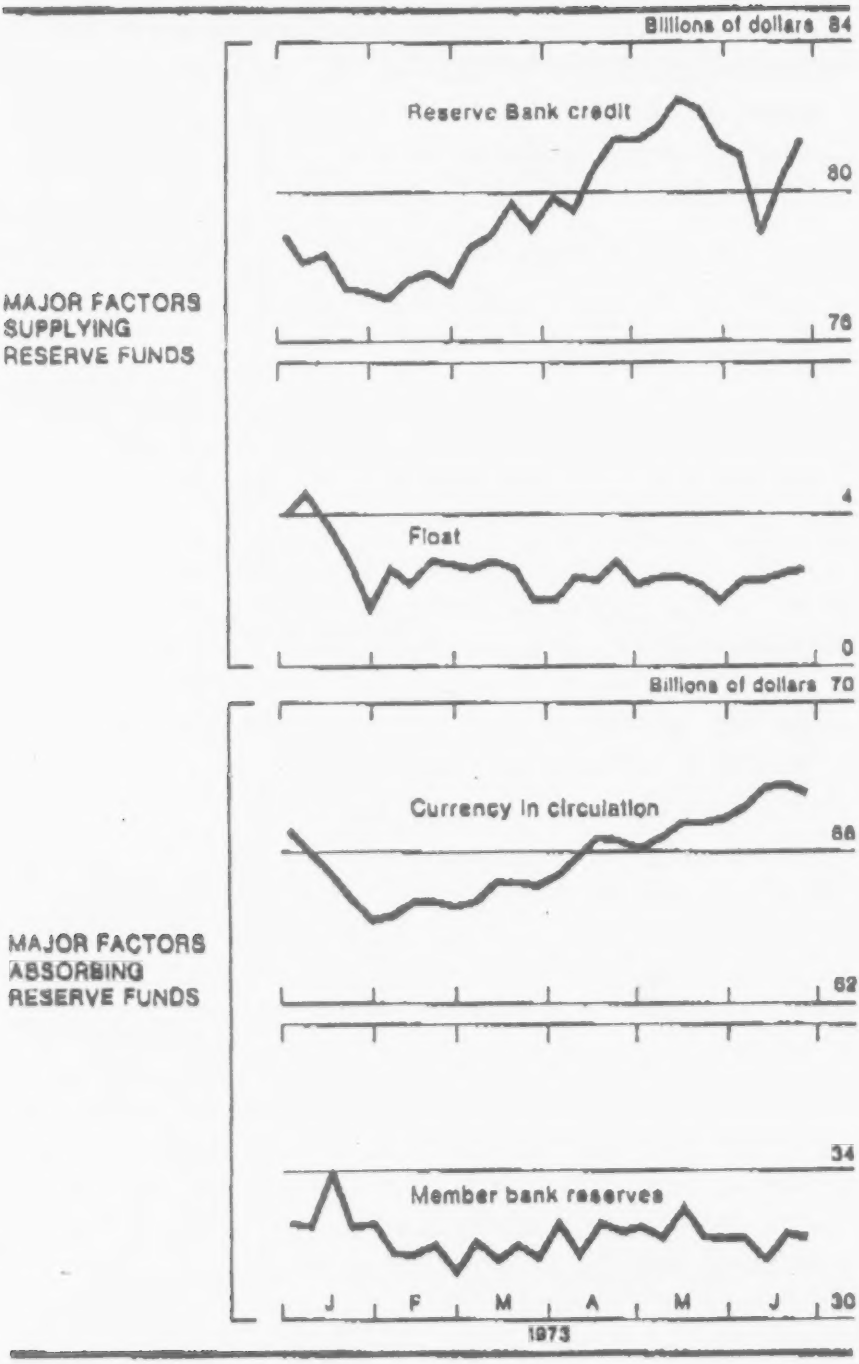
* * *

As Table 2 shows, Federal Reserve credit is the major factor on the sources, or supply, side of the bank reserve equation. The components of Federal Reserve credit consist of the System's security holdings, Reserve Bank loans, float, and other assets.

* * *

Another component of Federal Reserve credit is float—the difference between cash items in process of collection and deferred availability cash items. The importance of float hinges not so much on the total amount of reserves it supplies—because that volume is relatively small compared with the volume supplied by other components of Federal Reserve credit—but rather on the volume and frequency of changes in its level. From one week to another float may vary sharply and sometimes quite erratically. During one week in January 1973, for example, it declined by $1.2 billion on a daily-average basis. Therefore, it is very difficult to predict the extent to which float will affect week-to-week changes in bank reserves. During the first half of 1973 the highest daily-average level of float for any week was $4.5 billion, and the lowest was $1.7 billion. Meanwhile, over the half year the level of float declined by $1.1 billion on balance, reducing the supply of reserve funds by a similar amount.

CHART 5B
BANK RESERVE EQUATION — Weekly Averages



Weekly averages of daily figures.

[13] "A Day at the Fed"

* * *

Floating in a paper sea

After processing, most checks are bundled and dispatched to the banks on which they are drawn. Each bundle contains a copy of the Fed's tally.

In a number of cases, the System credits faster than it charges. Depositing banks are given immediate credit for most of their checks and have to wait only one or two business days for credit on the others. But not infrequently the Fed takes longer than that before it can collect from the banks against which the checks are drawn. As a result, reserves are supplied to the banking system. This addition to bank reserves, called "float," can be considerable. Occasionally, float rises sharply because the time needed to collect is increased unexpectedly by a large influx of checks that creates log jams of unprocessed paper work, or by bad weather that slows transportation and prevents checks from being presented quickly to the paying banks.

Weather and work jams are not only bothersome in terms of efficient check processing, but in terms of the nation's economic goals as well. A rising level of float during a period in which the Federal Reserve is attempting to hold down the growth of bank reserves, for example, would thwart the effectiveness of monetary policy unless offset by open market operations.

The System has launched an attack against delays in transportation and the generally rising level of float stemming from the steady increase in the number of checks by establishing a network of regional check processing centers to supplement facilities at Reserve Banks and branches.

The centers, popularly known as RCPCs, are located in major regional check generating areas. With RCPCs, checks deposited in such areas can be delivered for processing and dispatched to paying banks faster than if the checks had to be processed through the nearest Reserve Bank or branch.

And of equal importance, these centers represent an expansion of the Reserve System's checks processing capacity that should help Reserve Banks cope with the rising tide of checks. The New York Fed has RCPCs in Jericho, Utica and Buffalo, New York and Cranford, New Jersey.

* * *

Petitioners' Exhibit 9

* * * *

[17] The Story of Checks

(Published by the Public Information Department, Federal Reserve Bank of New York, Sixth Edition: 1975)

The Federal Reserve is introducing new check clearing technology and procedures to help handle the growing volume.

* * * *

One step is the establishment of Regional Check Processing Centers to supplement Reserve Bank and Branch facilities.

* * * *

Those centers are in major regional check generating areas. Checks deposited in those areas can be delivered, processed and dispatched to paying banks faster than if they were transported to the nearest Reserve Bank or Branch.

These facilities are an expansion of System processing capacity established to provide for *overnight* check clearance. (Italics supplied)

* * * *

[20] *Glossary*

REGIONAL CHECK PROCESSING CENTER—A Federal Reserve Facility in which check processing operations are performed. These Centers serve a group of banks located within a specified area of a Federal Reserve District. They expedite collection and settlement of checks within the area on an *overnight* basis. (Italics supplied).

ATTACHMENT 1

NEW YORK FEDERAL RESERVE BANK

TABLE 2:

THE PLAINTIFFS, THEIR CHECKS, AND THE NEW YORK FED'S MIDNIGHT DEADLINE[1]

PAYEE	*AMOUNT*	*DATE RECEIVED*	*DATE PRESENTED*	*DATE OF CHECK*	*MIDNIGHT DEADLINE*[4]	*SUMMARY JUDGMENT APPENDIX*
GBP	$ 43,537.66	11/22	12/05	10/31	11/23	1
GBP	109,671.55	11/29	12/07	11/23	11/30	4
E.P. Kirst & Sons	6,984.20	11/22	12/05	11/16	11/23	7
Mardon Gardens	3,302.32	11/29	12/06	11/11	11/30	10
Amer. Security Corp.	8,000.00	11/25	11/30	11/02	11/28	13
Orchard Yarn	26,069.49	NH[2]	NH	NH	NH	
Broadway Supply Co.	15,940.21	11/29	12/01	11/23	11/30	16
Union Sun & Journal	1,275.00	11/30	12/08	11/23	12/01	19
Niagara Hobby Dist.	21,935.15	11/26	12/05	11/23	11/29	22
Auburn Hosiery Mills	5,210.51	11/19	11/30	11/10	11/22	25
Tolona Pizza Prods.	2,947.89	11/29	12/02	10/10	11/30	28
Tolona Pizza Prods.	1,732.63	12/02[3]	12/05	11/21	12/05	30A
Artcraft Mills	8,316.00	11/25	11/30	11/10	11/28	31
Lawtex	16,660.61	11/25	11/30	11/10	11/28	34
R.A. Plymouth	4,104.08	11/25	12/02	11/11	11/28	37
Ullman Co. Inc.	3,386.28	11/29	12/02	11/11	11/30	40
Huffman Mfg. Co.	25,041.58	12/01	12/05	10/28	12/02	43
Harris & Covington Hosiery	10,470.66	11/26	12/01	11/18	11/29	46
Gindi International	10,560.29	11/26	12/05	11/23	11/29	49
Proctor & Gamble Distrib. Co.	5,677.39	11/26	12/01	11/18	11/29	52
Proctor & Gamble Distrib. Co.	32,134.75	11/24	11/30	11/18	11/28	55
Oakdell, Inc.	21,921.00	11/26	12/01	11/18	11/29	58
Lambert of Arkansas	10,758.29	12/01	12/02	11/04	12/02	61
Park Newspapers	25,000.00	NH	NH	NH	NH	
E.J. Brach & Sons	18,940.66	11/26	12/01	11/21	11/29	64
E.J. Brach & Sons	4,397.07	NH	NH	NH	NH	
McDonald Air Cond., Inc.	298.49	12/01	12/05	11/21	12/02	67
McDonald Air Cond., Inc.	2,510.87	11/29	12/01	11/22	11/30	70
Gloray Knitting Mills	8,104.34	11/26	12/01	11/07	11/29	73
McGrath & Hamin, Inc.	11,859.58	11/30	12/02	11/23	12/01	76
Evening Telegram	1,319.53	NH	NH	NH	NH	
Marvin Accessories, Inc.	9,644.00	NH	NH	NH	NH	
Dollcraft Indus., Ltd.	13,030.77	11/25	11/30	11/11	11/28	79
Teters Floral Prods.	14,951.39	11/30	12/02	11/23	12/01	82
Amos Hosiery Mills, Inc.	9,261.31	11/25	11/30	11/17	11/28	85
Amos Hosiery Mills, Inc.	8,883.26	11/30	12/02	11/23	12/01	88
Bee Gee Distrib. Corp.	100,000.00	11/28	12/02	11/21	11/29	91
PPG Indus., Inc.	59,410.18	11/26	12/01	11/23	11/29	94
Riegel Textile Corp.	24,914.21	11/29	12/02	11/23	11/30	97
Coleman Co.	6,438.93	11/26	12/01	11/11	11/29	100
Temple Distributors, Inc.	25,000.00	11/24	11/30	11/18	11/28	103
Anderson Rubber Co.	230.56	NH	NH	NH	NH	
Dy-Co Mgmt. Corp.	7,673.00	11/25	11/30	10/11	11/28	106
H&K Distributing Co.	9,644.72	11/29	12/07	11/23	11/30	109
Hamburg Pennysaver	1,383.26	11/29	12/07	11/23	11/30	112
Senry Lee Co.	163.70	12/01	12/05	10/10	12/02	115
Goldie R. Shaffer	3,180.30	12/01	12/05	11/10	12/02	118
Goldie R. Shaffer	795.07	12/01	12/05	11/10	12/02	121
Village of Arcade	788.49	NH	NH	NH	NH	
Bank of Palm Beach	3,193.85	NH	NH	NH	NH	
Republican Publ. Co.	5,219.96	NH	NH	NH	NH	
Mount Vernon News	1,131.89	12/01	12/05	11/23	12/02	124
Estate of Dr. R. Armstrong	937.50	NH	NH	NH	NH	
Emerson Radio Corp.	80,010.32	11/28	12/01	11/21	11/29	126
Quaker State Oil Ref. Corp.	8,837.49	11/28	12/01	11/21	11/29	129
Commonwealth of MA	860.57	11/29	12/02	11/11	11/30	132
Leonard L. Farber Co.	2,106.00	12/01	12/05	10/03	12/02	135
Leonard L. Farber Co.	2,106.00	NH	NH	NH	NH	
Texstar Automotive	47,000.00	11/29	12/01	11/21	11/30	137
Mrs. Smith's Frozen Foods	2,729.42	NH	NH	NH	NH	
Mrs. Smith's Pie Co.	254.00	12/01	12/02	10/10	12/02	141
Lafayette Brass Co.	14,145.43	11/28	12/01	11/18	11/29	144
Pleasure Knit Corp.	11,687.18	11/29	12/01	11/11	11/30	147
Pleasure Knit Corp.	2,417.50	11/29	12/01	11/04	11/30	150
Cortland Standard	1,610.31	12/01	12/05	11/23	12/02	153
Petersen Mfg. Co.	1,951.97	11/30	12/02	10/31	12/01	156
Barclay Knitwear Co.	3,940.06	11/30	12/02	10/28	12/01	159
Commercial Light Co.	34.65	11/30	12/02	11/23	12/01	162
Cortlandt Sanitation Serv.	481.50	12/01	12/05	11/23	12/02	165
Union Slaughter House	264.94	11/30	12/05	10/10	12/01	168
Capital Cake Co.	18,619.44	11/29	12/01	11/18	11/30	171
United Cutlery	7,066.88	11/28	12/02	11/18	11/29	174
Stickley Corp.	7,210.71	NH	NH	NH	NH	
Charlaps Dairy Farms, Inc.	1,055.17	NH	NH	NH	NH	
Outler Ridge Assoc.	4,104.08	NH	NH	NH	NH	

[1] This table is offered to the Court pursuant to Fed. R. Evid. 1006. *See also* First Recommendation of the Board of Editors of the Manual for Complex Litigation, 1 Part 2 Moore's Federal Practice ¶2.71 at 131 (1986) ("Voluminous or complicated data of an admissible character should, whenever possible, be presented through written or oral summaries, tabulations, charts; graphs or extracts.").

[2] The New York Fed has no record that it handled any check which is designated "NH".

[3] Although the Buffalo Branch does not have a record of when this specific check was received, the endorsement of the depositary bank (the bank that first received the check on deposit) discloses that it received the check on December 2, 1977. We shall assume, for purposes of this motion, that the depositary bank immediately transmitted the check to the Buffalo Branch, which received it on December 2, 1977.

[4] There is a 1977 calendar reproduced in the Summary Judgment Appendix at pages 424-425.

No. 88-1690

Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GREATER BUFFALO PRESS, INC., individually, and as payee and holder; and on behalf of each other similarly situated payee and holder on Appendix A; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A., (formerly THE LINCOLN FIRST BANK);

Petitioner,

VS.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, NY Branch thereof; JOHN T. KEAN, individually, and as an Officer and Manager thereof;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS C. BAXTER, JR.
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(212) 720-5035
Counsel for Respondents

Of counsel:

Ernest T. Patrikis
General Counsel

Jonathan I. Polk
Attorney

QUESTION PRESENTED

Whether the court of appeals properly affirmed the judgment of the district court, which granted the summary judgment motion of the respondents and dismissed this suit brought by the petitioner, who alleged that the respondents failed to exercise ordinary care in the handling of checks drawn by a bankrupt?

STATEMENT BY CORPORATE RESPONDENT

The respondent, Federal Reserve Bank of New York, is a corporation chartered under the laws of the United States pursuant to the Federal Reserve Act. 12 U.S.C. § 226 *et seq.* Respondent has no parent company nor does it have any partially-owned subsidiaries or affiliates. Although stock of the respondent is owned by member commercial banks within the Second Federal Reserve District, none of the shareholders control the respondent. This statement is made pursuant to Supreme Court Rule 28.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GREATER BUFFALO PRESS, INC., individually, and as payee and holder; and on behalf of each other similarly situated payee and holder on Appendix A; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A., (formerly THE LINCOLN FIRST BANK);

Petitioner,

vs.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, NY Branch thereof; JOHN T. KEAN, individually, and as an Officer and Manager thereof;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Federal Reserve Bank of New York and John T. Kean,[1] respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion (Pet. App. 1a-21a) is

1 Because Mr. Keane is an officer of the Federal Reserve Bank of New York who acted within the scope of his authority, his interest in this action is coincident with the interest of his employer, and this brief will refer to Mr. Keane and the Federal Reserve Bank of New York collectively as "respondent."

reported at 866 F.2d 38 (2d Cir. 1989). The opinion of the district court (Pet. App. 22a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1989. The petition for a writ of certiorari was filed on April 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2106, and 2111. Federal subject matter jurisdiction in the lower courts was based on 12 U.S.C. § 632 and 28 U.S.C. § 1331.

STATEMENT OF THE CASE

1. Respondent is a part of the Federal Reserve System, the nation's central bank. One of the banking functions performed by the respondent, the collection of checks, is the function involved in this action.

2. Petitioner, Greater Buffalo Press, Inc., brought this action in the United States District Court for the Western District of New York on behalf of itself and 59 other parties, who are said to be similarly situated. Petitioner contended that respondent failed to exercise ordinary care in presenting checks to the bank on which they were drawn. Petitioner was a payee on two of these checks. The checks were all drawn by Neisner Brothers, Inc., a bankrupt retail department store, and were intended to pay the petitioner and the 59 other parties for goods and services. Petitioner was a trade creditor of the bankrupt.

3. Petitioner contended that, if respondent had exercised ordinary care in presenting the bankrupt's checks, those checks would have been presented by the respondent to the bank on which they were drawn before the bankruptcy petition was filed. If that happened, the petitioner further contended, then the checks would have been fully paid.

4. After nine years of pre-trial proceedings, including extensive discovery, the respondent filed a motion to dismiss the action, or alternatively, for summary judgment. The district

court ordered that the motion "be granted in all respects." Pet. App. 32a. Accordingly, judgment was granted to the respondent dismissing the petitioner's complaint. Pet. App. 32a.

The district court determined that, during the time material to this action, a Federal Reserve Bank acted as agent of the "sender" only (12 C.F.R. § 210.6 [1977]) in handling a check, and that the statutory duty to exercise ordinary care in the presentment of checks was a duty owed by the collection "agent" to its principal only. N.Y.U.C.C. §§ 4-201, 4-202 (McKinney 1964). Because the then-operative provision of Regulation J of the Board of Governors of the Federal Reserve System provided that Reserve Banks were the collection agents of the sender only, and because the payee of a check was excluded from the definition of "sender" (12 C.F.R. § 210.2(e) (1977)) (Pet. App. 43a), the respondent owed no duty to the petitioner because petitioner was not respondent's principal. Alternatively, the district court found that, with respect to 63 of the 75 checks involved in the action, there were no "actionable claims with respect to these checks. U.C.C. § 4-103(5) (McKinney 1964)." Pet. App. 34a. As for the remaining 12 checks, the district court believed that "[d]eterminations . . . could not have been made on the papers." Pet. App. 34a n.10.

5. The court of appeals affirmed the judgment of the district court, holding that the respondent did not owe a duty to petitioner under the Uniform Commercial Code (hereafter "UCC" or "Code"), because of Regulation J's "sender" rule. Pet. App. 16a. The court reasoned that:

> The application of Regulation J to this case is straightforward. The [petitioner's] cause of action against [the respondent] is based entirely on the theory that [it] breached duties required of it as an agent of the [petitioner] in the check collection process. Regulation J unambiguously 'severs the agency relationship' between [the respondent] and the 'non-sender' [petitioner]. [Citation omitted.] Because Regulation J requires that [respondent] not be considered an agent of the [petitioner], [respon-

> dent] cannot be found to have owed the [petitioner] any duty . . . .

Pet. App. 16a.

The decision below acknowledged the legitimate policy rationale for the sender rule, accepting that the rule assisted the Reserve Banks in offering a "free" check collection service. The rule "effectively limited the Reserve Bank's duty to exercise ordinary care to only those institutions who were receiving the gratuitous service, thereby reducing losses as well as the overall cost of the service." Pet. App. 19a.

SUMMARY OF ARGUMENT

The court of appeals properly affirmed the judgment of the district court, which was supported by an opinion that: (a) was based upon case law that is uniform among the courts of appeals; (b) contained alternative reasoning premised upon State law grounds; and (c) interpreted a provision of Regulation J that was repealed in 1986. Consequently, the petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decision Below is Not Based Upon an Important Question of Federal Law.

Petitioner incorrectly believes that this action was resolved on the basis of the sovereign's immunity (Pet. 9), but that clearly is not the case. Instead, both the district court and the court of appeals held that the respondent owed no agency duty to the petitioner to exercise ordinary care in handling checks because petitioner was not the respondent's principal. The basis for this holding was State law, namely N.Y.U.C.C. §§ 4-201, 4-202 (McKinney 1964), as supplemented or modified by the "sender" rule of Regulation J. 12 C.F.R. § 210.6(a) (1977).

As the Second Circuit stated, the petitioner "cannot recover against [the respondent] by simply criticizing its operations [and

can sustain its action] only by reliance on the provisions of New York's Uniform Commercial Code that deal specifically with the duties of banks in collecting and processing checks. *See* N.Y.U.C.C. §§ 4-201, 4-202 (McKinney 1964)." Pet. App. 11a.

Because the decision below rests most fundamentally upon an interpretation of New York's Uniform Commercial Code, there is no substantial Federal question at issue. To be sure, Regulation J was an important ingredient in the interpretation, but this regulation should be viewed as an agreement supplementing State law (N.Y.U.C.C. § 4-103(3) (McKinney 1964)) instead of Federal law that overrides it. Pet. App. 16a-17a. When properly viewed, the sender rule has the force of an "agreement" varying State law and there is no Federal law question to be considered by this Court.

Consequently, there is no significant issue of Federal law in this case.

2. There is no Dispute Among the Courts of Appeals Concerning the Effect of the Sender Rule.

The Federal courts have uniformly decided that the duty of a Federal Reserve Bank to exercise ordinary care in collecting checks, during the time when the "sender" rule was extant, was owed only to so-called "senders" of checks. Therefore, the decision in this case that the respondent did not owe any duty of care to the petitioner (who was not a sender) is completely in accord with the rulings of other Federal courts. *See Childs v. Federal Reserve Bank of Dallas*, 719 F.2d 812 (5th Cir. 1983), *rehearing denied*, 724 F.2d 127 (5th Cir. 1984); *First Nat'l Bank of Gatlinburg v. Republicbank Dallas, N.A.*, 676 F. Supp. 128 (N.D. Texas 1987); *Washington Petroleum & Supply Co. v. Girard Bank*, 629 F. Supp. 1224 (M.D. Pa. 1983); *Northbrook Trust and Sav. Bank v. Palos Bank and Trust Co.*, 505 F. Supp. 1002 (N.D. Ill. 1981); *Appliance Buyers Credit Corp. v. Prospect Nat'l Bank of Peoria*, 505 F. Supp. 163 (C.D. Ill. 1981), *aff'd*, 708 F.2d 290 (7th Cir. 1983); *Colonial Cadillac, Inc. v. Shawmut Merchants Bank, N.A.*, 488 F. Supp. 283 (D. Mass. 1980).

Although it may be true that district courts[2] have differed in their analysis of the inter-relationship between the sender rule and the UCC (*Compare Appliance Buyers Credit Corp. v. Prospect Nat'l Bank of Peoria*, 505 F. Supp. 163, 164 (C.D. Ill. 1981), *aff'd*, 708 F.2d 290 (7th Cir. 1983) (viewing the sender rule as an agreement varying the UCC) *with Colonial Cadillac, Inc. v. Shawmut Merchants Bank, N.A.*, 488 F. Supp. 283, 286 (D. Mass. 1980) (viewing the sender rule as preempting the UCC)), these courts have had no difficulty in applying the rule to reach a uniform conclusion: Regulation J limited the duty that Reserve Banks owe to exercise ordinary care in handling checks to the sender only. Pet. App. 15a.

Thus, this represents a simple commercial case decided in accordance with well-settled case law. It has nothing whatsoever to do with the immunity of the sovereign, the money supply, or the fanciful cover-up referenced in the Petition.

3. The Petitioner's Invitation to Deliver an Advisory Opinion Regarding a Repealed Regulation Should be Declined.

The petitioner complains that "the Second Circuit never made [it] clear" whether Regulation J is an agreement varying the UCC or Federal law overriding it (Pet. 13), and urges the Supreme Court to "resolve the nature and extent" of this issue. Pet. 13. This argument is first, incorrect, and second, immaterial.

First, the Second Circuit found that the sender rule was an agreement varying the Code. The statement that "this case reveals no basic inconsistency between Regulation J and the New York Uniform Commercial Code" is hostile to any preemption analysis (Pet. App. 16a), and recognizes that the now-repealed sender rule is an agreement varying the Code.

Second, the subsidiary question whether the "sender" rule preempts the UCC or "varies [it] by agreement" need not be answered, because it is unnecessary to the resolution of the litigation. The only necessary considerations are whether the

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2 The Fifth and Second Circuits are in perfect harmony.

sender rule governs the case at hand, and if it does, what is the outcome. The answer to both questions is clear under well-settled law: the sender rule applies, and it precludes the petitioner from recovering against the respondent. Further, the repeal of the sender rule makes the petitioner's request for an opinion addressing the rule's doctrinal foundation a request that the Court engage in an academic exercise.

4. There are Alternative State Law Grounds for the Decision.

Even if respondent had a duty to exercise ordinary care in handling petitioner's checks and owed that duty to the petitioner, a proposition that Federal courts have uniformly rejected in cases like this, there are alternative State law grounds for the decision below under N.Y.U.C.C. §§ 4-103(5) and 4-108 (McKinney 1964).

The district court, for example, found an alternative basis for summary judgment with respect to 63 of the 75 checks involved—the court found that the payees had no actionable damages on these checks because they would have been uncollectible even without the respondent's processing delay. Pet. App. 34a at note 10. The basis for the district court's determination was N.Y.U.C.C. § 4-103(5), which authorizes a direct damage recovery only if the respondent's alleged failure to exercise ordinary care was the cause of the petitioner's inability to recover the full amount of a check. The district court thought there were material facts that precluded extension of this alternative rationale for summary judgment to claims regarding the remaining 12 checks.

In the court of appeals, respondent demonstrated, in alternative support of the judgment of the district court, that the balances which would have funded the payment of the 12 remaining checks (a fact essential to a recovery because of Section 4-103(5)) were generated by the bankrupt's deposit of so-called depositary transfer checks ("DTCs"). Because the funding DTCs were caught in the same processing delay as the checks of the petitioner, the respondent's processing delay gave an appearance of sufficiency to the balances which would have

funded payment of petitioner's checks. Thus, the balances which the petitioner believed were sufficient to pay its checks were not, in fact, "good" balances. "But for" the respondent's processing delay, the drawer of the 12 checks would have filed for bankruptcy sooner.

Thus, N.Y.U.C.C. § 4-103(5) provides an alternative State law basis for the decision below, and rests entirely upon the unique facts of the case.

Still another alternative State law basis for the decision below is N.Y.U.C.C. § 4-108, which excuses delays resulting from *force majeure* conditions like computer breakdowns. *Accord*, 12 C.F.R. § 210.14 (1988). *See Port City State Bank v. American National Bank*, 486 F.2d 196 (10th Cir. 1973) (interpreting 12 C.F.R. § 210.14). The delay of the respondent in this matter resulted from a concatenation of two phenomena, an abrupt increase in check processing volume and a computer breakdown. Pet. App. 27a-29a. This is the type of condition that is excused by Section 4-108, and this particular Code provision affords respondent with yet another complete defense that applies to all of the 75 checks involved in this action.

5. Petitioner's Claim that the Decision Below Works an Injustice of Constitutional Proportion is Meritless.

The petitioner's claim that the payees of the bankrupt's checks "were left without an effective remedy" (Pet. 15) is simply untrue. The payees of the checks were able to claim against the bankrupt drawer of the checks just like any other creditors of a bankrupt. Furthermore, the distribution approved by the Bankruptcy Court that handled the drawer's bankruptcy was between 45 and 65 cents on every dollar claimed. In view of this substantial distribution, the petitioner's assertion that the "Second Circuit's decision . . . leave[s] the holders remediless . . ." is nothing more than an advocate's puffery.

The petitioner's real grievance is with the court of appeals' refusal to place the respondent in the position of an unsecured creditor of the bankrupt drawer, and to make the respondent accountable for the petitioner's poor credit judgment. In effect,

that is the relief which the petitioner has sought throughout this action.

The Second Circuit's failure to grant this relief is hardly "unfair," because it was the petitioner's credit judgment that was "bad." Further, the decision below surely did not leave the petitioner "remediless." It left the petitioner free to pursue a claim in bankruptcy, which is the proper procedure for anyone who misjudges a bankrupt's creditworthiness. Of course, the Bankruptcy Law's limitation of the monetary value of a creditor's right is not "unconstitutional" (*see, e.g., Continental Illinois Nat'l Bank and Trust Co. v. Chicago R. I. & P. Ry. Co.*, 294 U.S. 648, 674 (1935); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187-189 (1902)), and neither is the decision below.

6. The Decision Below Will Affect No Other Litigants.

The Board of Governors of the Federal Reserve System repealed the "sender rule" from Regulation J in June of 1986. 51 Fed. Reg. 21740 (June 16, 1986). Consequently, the result in this case will not be repeated because the rule that determined the outcome no longer exists.

Further, respondent is not aware of any pending litigation that would be affected by the repealed rule. Therefore, the disposition of this action affects only the parties to the action, and the decision below has little, if any, precedential effect.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 17, 1989

Respectfully submitted,

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